Supreme Court of the United States

OCTOBER TERM, 1969

No. 730

ARCHIE WILLIAM HILL, JR., *Petitioner*,

—v.—

CALIFORNIA, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

S.C. No. 325651
D. A. No. 400723

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

ALFRED ELMO BAUM, RICHARD JOSEPH BADER *and* ARCHIE WILLIAM HILL, JR., DEFENDANTS

INFORMATION—filed July 15, 1966

ROBBERY (Sec. 211 P.C.)—
COUNTS I & II
KIDNAP/ROBBERY—COUNT III

The said ALFRED ELMO BAUM, RICHARD JOSEPH BADER and ARCHIE WILLIAM HILL, JR. are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of ROBBERY, in violation of Section 211, Penal Code of California, a felony, committed as follows: that the said ALFRED ELMO BAUM, RICHARD JOSEPH BADER and ARCHIE WILLIAM HILL, JR. on or about the 4th day of June, 1966, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take personal property from the person, possession and immediate presence of Nicholas Georgiade.

That at the time of the commission of the above offense said defendants were armed with a deadly weapon, to wit, .22 caliber revolver, .22 caliber starter pistol, snap blade knife, bayonet.

COUNT II

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count I hereof, the said

ALFRED ELMO BAUM, RICHARD JOSEPH BADER and ARCHIE WILLIAM HILL, JR. is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of ROBBERY, in violation of Section 211, Penal Code of California, a felony, committed as follows: that the said ALFRED ELMO BAUM, RICHARD JOSEPH BADER and ARCHIE WILLIAM HILL, JR. on or about the 4th day of June, 1966, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously and by means of force and fear take personal property from the person, possession and immediate presence of Bertha Georgiade.

That at the time of the commission of the above offense said defendants were armed with a deadly weapon, to wit, .22 caliber revolver, .22 caliber starter pistol, snap blade knife, bayonet.

COUNT III

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charges set forth in all the preceding counts hereof, the said ALFRED ELMO BAUM, RICHARD JOSEPH BADER and ARCHIE WILLIAM HILL, JR. are accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of KIDNAPING FOR THE PURPOSE OF ROBBERY, in violation of Section 209 Penal Code, a felony, committed as follows: That the said ALFRED ELMO BAUM, RICHARD JOSEPH BADER and ARCHIE WILLIAM HILL, JR. on or about the 4th day of June, 1966 at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously kidnap and carry away Bertha Georgiade, to commit robbery.

EVELLE J. YOUNGER, District Attorney
for the County of Los Angeles,
State of California

By /s/ R. Paul Esnard
R. PAUL ESNARD, Deputy

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 101

Case No. 325651

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

ARCHIE WILLIAM HILL, JR.

Present Hon. HERBERT V. WALKER, Judge

APPEARANCES:

(Parties and Counsel checked if present.
Counsel shown opposite parties represented.)

EVELLE J. YOUNGER, District Attorney, by
J. JOHNSEN, Deputy
E. J. HOVDEN, Public Defender, by
L. BERGER, Deputy

MINUTES—August 5, 1966

On motion under section 995 Penal Code called for hearing. Motion under section 995 Penal Code is argued and denied as to each count. The defendant is arraigned and pleads "Not Guilty" to each count. Cause is transferred to department 100 and continued to August 9, 1966 at 9 A.M. for resetting. Remanded.

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 100

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

REMANDED

Present Hon. RICHARD F. C. HAYDEN, Judge

MINUTES—August 19, 1966

	Defendant	Defendant's Counsel	Date of Trial	Dept.
325651	Archie William Hill Jr **	L Berger	Sept. 27, 1966	106
326408	Leon Brown	Deputy Public Defender J Moss	Sept. 29, 1966	118
326742	Bernard Harold Benton	" "	Sept. 26, 1966	110
326624	Henry Epharn alias Henry Effron Jr	" "	Sept. 29, 1966	119
326881	Stella Alarid	" "	Sept. 27, 1966	101
326884	Samuel Lloyd and	" "	Sept. 30, 1966	102
	John William Mingo	" "	Sept. 30, 1966	102
326985	Marie Carter	" "	Sept. 29, 1966	117
326996	Jesse Wade Jackson	" "	Sept. 30, 1966	103
327005	Byron Lowry Hamlin	" "	Sept. 30, 1966	107
327009	Wedisse Mayfield ** and	" "	Sept. 30, 1966	108
	S A Christian Jr	" "	Sept. 30, 1966	108
327031	Atilla John Prisznyak and	" "	Sept. 30, 1966	108
	Wayne Thomas Cook alias Duane Thomas Cook True Name	" "	Sept. 30, 1966	108
327032	John Ysidro Adams John Meiia	" "	Sept. 30, 1966	110
327103	Johnny Holquin Aranda	" "	Sept. 30, 1966	111
	Bail			
326900	Bobby Jenkins	" "	Sept. 29, 1966	118
326713	Antonia Valdez Cristo alias Antonia Valdez	" "	Oct. 4, 1966	112
326899	Emanuel Robert McMeans	" "	Sept. 30, 1966	103
326999	Charles M Sanchez	" "	Sept. 30, 1966	104
327000	Richard Lozano	" "	Sept. 30, 1966	106
327007	Richard Earl Rankin	" "	Sept. 30, 1966	108
327048	James Michael Sheeham	" "	Sept. 30, 1966	110

As to each defendant: Deputy District Attorney J Pregerson and the defendant with counsel, present. Pleads "Not Guilty". Trial set for 9 A M on date and in department indicated.

* Defendant waives time for trial.

** Defendant, personally, and all counsel waive trial by jury.

*** Defendant denies the allegations of the prior convictions.

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 106

Case No. 325651

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

ARCHIE WILLIAM HILL, JR.

Present Hon. VERNON P. SPENCER, Judge

APPEARANCES:

(Parties and Counsel checked if present.
Counsel shown opposite parties represented.)

EVELLE J. YOUNGER, District Attorney, by
H. HERZBRUN, Deputy
E. J. HOVDEN, Public Defender, by
L. BERGER, Deputy

MINUTES—September 27, 1966

Cause called for trial. The defendant(s) personally and all counsel waive jury trial.

By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings.

It is further stipulated that any exhibits received at the preliminary hearing are deemed received in evidence in these proceedings, subject to this Court's ruling.

People's Exhibit 9 (preliminary transcript) in evidence by reference. Further proceedings continued to October 6, 1966, 9 A M for additional evidence, Remanded.

IN THE
DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Crim. 12275

No. 2 Crim. 13180

Filed Court of Appeal, 2nd District, Feb. 9, 1967

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF-RESPONDENT

vs.

ARCHIE WILLIAM HILL, JR., DEFENDANT-APPELLANT

Appeal from the Superior Court of the State of California for the County of Los Angeles

HON. VERNON P. SPENCER, Judge

REPORTER'S TRANSCRIPT—September 27, 1966

APPEARANCES:

For Plaintiff-Respondent: The State Attorney General, State of California.

For Defendant-Appellant: In Propria Persona.

[fol. 2] LOS ANGELES, CALIFORNIA, TUESDAY, SEPTEMBER 27th, 1966, 1:30 P.M.

THE COURT: Hill.

MR. HERZBRUN: Your Honor, in this matter there is to be a waiver of jury and submission on the transcript.

MR. BERGER: Yes, your Honor. There was a jury waiver taken at arraignment.

THE COURT: All right.

MR. HERZBRUN: May it now be stipulated that the Court may read and consider the testimony taken at the

preliminary hearing with the same force and effect as though the witnesses there called were here called, sworn and testified to the matters therein contained; all stipulations entered into at the preliminary hearing may be deemed entered into here; that the exhibits introduced at the preliminary may be deemed introduced here under their respective numbers, that is People's 1 through 8, subject to either side putting on additional testimony and subject also to the original transcript being marked in evidence by reference as the next exhibit in order, that is People's 9; subject also to the right of counsel to make whatever objections they desire to the introduction of evidence and put on such additional testimony as they may desire.

MR. BERGER: So stipulated.

THE COURT: All right. Take the confrontation waiver.

[fol. 3] MR. HERZBRUN: Mr. Hill, you understand that what happens now is the Court will read the testimony taken at the preliminary hearing and listen to whatever other testimony is introduced, and upon that testimony decide whether you are guilty or not guilty.

Is that arrangement satisfactory to you?

THE DEFENDANT: Yes, it is.

MR. HERZBRUN: Mr. Hill, you have a right to have witnesses called back into court to testify a second time, but you may waive that right, give up that right if you so desire.

Do you give up your right of confrontation?

THE DEFENDANT: Yes.

MR. BERGER: Counsel joins.

THE COURT: All right.

MR. BERGER: I understand a convenient date would be the 6th of October?

THE COURT: I guess so. It won't be any sooner than that. Is there going to be additional testimony?

MR. HERZBRUN: There will be on the part of the People—one witness.

THE COURT: Very well. The matter will be continued to October 6, 1966.

(The matter was continued to Thursday, October 6, 1966.)

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Division No. 68

No. 900,707

HON. GEORGE B. ROSS, Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

ALFRED ELMO BAUM, RICHARD JOSEPH BADER, JERRY EDWARD BACA, (Dismissed) ARCHIE WILLIAM HILL, JR., DEFENDANTS

CT. I, II ROBBERY (Viol. Sec. 211 P.C.)
CT. III KIDNAPING FOR THE PURPOSE OF ROBBERY (Viol. Sec. 209 P.C.)

Felonies

REPORTER'S TRANSCRIPT, PRELIMINARY EXAMINATION—Friday, July 1, 1966

APPEARANCES:

For the People:	ROBERT R. DEVICH, Esq. Deputy District Attorney
For the Defendants Baum and Baca:	MEYER NEWMAN, Esq. Deputy Public Defender
For the Defendant Bader:	JOSEPH M. ROSEN, Esq.
For the Defendant Hill:	LOUIS BERGER, ESQ.
	WILLIAM A. WEIGEL, C.S.R. Official Reporter

[fol. 2] LOS ANGELES, CALIFORNIA, FRIDAY 1, 1966, 11:45 A.M.

THE COURT: Is the Baum case ready?

MR. DEVICH: The People are ready.

THE COURT: What are we going to do about the transcript?

MR. DEVICH: I believe we figured it would be just as expeditious to start from the first.

THE COURT: Whatever you want to do.

All defendants are present, counsel? Do you stipulate?

MR. ROSEN: Yes, your Honor.

MR. NEWMAN: Yes.

MR. BERGER: Yes, your Honor.

MR. DEVICH: May the following be marked for identification, a .22 Hornet revolver, bearing the number 6W21572? May it be marked People's 1?

THE COURT: Give me the serial number again.

MR. DEVICH: 6W21572.

THE COURT: All right.

MR. DEVICH: Further marked as People's 2 for identification a model 1960 caliber .22 Starter pistol. May that be marked People's 2?

THE COURT: So marked.

MR. DEVICH: May the following be marked People's [fol. 3] 3 collectively for identification: two switch-blade knives, with black handles, approximately eight inches in over-all length?

THE COURT: So marked.

MR. DEVICH: People' 4 for identification, a Fujica 35 automatic camera, bearing number 394844 with the brown case. May that be marked People's 4?

THE COURT: So marked.

MR. DEVICH: People's 5 for identification a Toshiba, T-o-s-h-i-b-a FM-AM portable radio and brown case. May that be marked People's 5?

THE COURT: So marked.

MR. DEVICH: And finally collectively as People's for identification number 6 what appears to be two white T-shirts sewn, with each T-shirt containing two holes. May they be marked People's 6?

THE COURT: Six.
MR. DEVICH: Thank you.
The People call Mr. Nicholas Georgiade.

NICHOLAS GEORGIADE

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Nicholas Georgiade. G-e-o-r-g-i-a-d-e.

[fol. 4] DIRECT EXAMINATION

BY MR. DEVICH:

Q Do you reside at 11935 Laurel Hills, in Studio City?
A That is right.
Q Is your phone number 761-7725?
A That is right.
Q With whom do you reside there, sir?
A With my wife and my mother.
Q Did you reside there on the date of June 4, 1966?
A Yes, I did.
Q Were you there in the evening around 10:20 P.M.?
A Yes, I was.
Q Were you with your wife and mother that evening?
A Yes, I was.
Q Did something happen at that location at approximately that time?
A Yes, it did.
Q What, sir?
A At about between 10:15 and 10:20 there was a very light tapping on my door, my front door. I went over to the front door and turned the light on, opened the door, and was greeted by four men. I believe two were wearing [fol. 5] masks, and two were unmasked. Two were holding guns, and two were holding knives.
Q Then what happened, sir?
A I think I was told this was a stickup. I am not quite sure. I for some reason thought it was some friends

of mine, pulling a joke, and I said, "You guys must be kidding around."

They said something like, "No. We are not fooling around."

And I said, "What is this, some kind of a joke?"

Right after that I was hit on the head.

Q With what were you hit on the head with?

A A gun.

Q I show you People's 1 for identification. Would you please examine it and see whether or not it's similar to the one that you were struck on the head with?

A It was this type gun, the same model, same color, same handle.

Q What portion of the gun were you struck on the head with?

A I don't know.

Q You indicated there were two with masks and two without masks.

A That is correct.

Q The two with masks, were they carrying anything [fol. 6] in their hands?

A Yes.

Q What, sir?

A The one I remember was the shortest man had that little gun there on the table.

Q Is that People's 2 for identification?

A That is correct. I don't recall who was carrying the other gun, but I know it was that other gun on the table, the one you just showed me.

Q You indicated two of them had knives. Do you recall which ones?

A No, I don't.

Q I direct your attention to the defendants seated at the far left of the counsel table. Were any of them the gentlemen that were at that location?

A I cannot recognize anyone positively.

Q Any similarities?

A Yes.

Q Which ones?

A The gentleman with the white shirt.

THE COURT: That is—

THE DEFENDANT BAUM: Baum.
THE COURT: Baum.

BY MR. DEVICH:

Q Which of the four was Mr. Baum, do you recall?
A He was the man without a mask.
[fol. 7] Q Did he have anything in his hand, do you recall?
A I can't recall.
Q You said that you were struck upon the head?
A Yes.
Q Did you receive any injuries?
A Yes. I received a laceration which required, I believe, seven stitches.
Q Were you knocked unconscious?
A No, I wasn't.
Q Was anything taken from you?
A Yes. Several articles. Two cameras, a Toshiba radio, my camera case, which I have had a long time, with lenses, and a few light bulbs in it and flash attachment, which was returned to me.
Q I show you—
THE COURT: Was anything taken from your person?
THE WITNESS: A few dollars, your Honor. I don't recall. Four or five dollars.
THE COURT: Who took the money from your person, do you know?
THE WITNESS: I don't know, sir. This was after I was struck. I don't recall.

BY MR. DEVICH:

Q Was it removed from your person, or did you hand [fol. 8] it over?
A No. I handed it over.
Q Upon demand or what?
A Yes.
Q I show you the Toshiba radio. Where was that the last time you saw it?
A It was in my planter, where I always leave it. That was the last place I saw it.

Q When you were struck upon the head, did you fall to the ground?

A No. I don't think I did. I think I was asked to lay on the floor. I don't think I fell on the ground.

Q Were you bleeding about the head?

A Yes. A great deal.

Q Was it Mr. Baum that obtained the money from you?

A I don't recall.

MR. NEWMAN: That has been asked and answered, your Honor.

THE COURT: Well, he said he doesn't recall.

BY MR. DEVICH:

Q You never gave these defendants or anybody permission to remove these items?

A No, sir.

Q Were you in fear at the time?

[fol. 9] A Yes, sir.

Q Your house is located in Los Angeles County?

A Yes, sir.

MR. DEVICH: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. BERGER:

Q Mr., is it Georgiade?

A That is correct.

Q Mr. Georgiade, on this occasion when you gave someone your money, was this before you were struck on the head or after you were struck on the head?

A After I was struck on the head.

Q When you said that this camera and this radio which were marked People's 4 and 5 for identification, were you present when they were taken by someone?

A Yes.

Q Was it before or after you were struck on the head?

A After I was struck on the head.

Q After you were hit on the head were you somewhat in a semi-conscious condition, would you say?

A No. I was fully conscious.

Q You were fully aware of everything that was going on about you?

[fol. 10] A I was fully aware of everything that was going on about me, but I couldn't see.

Q Were you eyes closed?

A No. I was lying face down.

Q Did you see who took the camera and the radio?

A No.

Q You didn't see, because you were lying face down at the time?

A That is correct.

Q Where was your wife and mother at that time?

A My mother was in the den, and my wife was in the bedroom.

Q Was your mother lying dace down to your knowledge?

A Kneeling down, yes.

Q What about your wife? What position was she in?

A In a kneeling crouch over me.

Q With her face down also to the best of your knowledge?

A At various times.

Q Did anyone go to the door with you when you answered the door that evening?

A No. Just myself.

Q Did you have a porch light on at that time?

A I turned it on, yes.

[fol. 11] Q You said that one of the men that held the gun had a mask on. Did both of the men who had masks on hold guns?

A I said I didn't recall.

Q You don't recall?

A Two men has masks?

Q You said two men had masks and two had none and two men had guns and two men had knives, is that correct?

A That is correct.

Q The two men that were masked, did they have guns or not, do you know?

A I said I don't recall.

Q The two men that were unmasked, did they have guns or knives if you recall?

A I don't recall. What I mean to say by that is I am not positive.

Q How long were you able to look at the four people on the porch before you were struck on the head?

A Well, from the porch and the conversation that took place in my home I would say about between 30 seconds and a minute.

Q How long were the defendants there in your home until they left you if you know?

A Twenty-five minutes, a half hour.

Q Therefore, your only opportunity to look at the de-
[fol. 12] fendants' face was during that 30 seconds to one minute that they were on the porch, is that correct?

A That is correct?

MR. BERGER: Nothing further.

CROSS-EXAMINATION

BY MR. NEWMAN:

Q Sir, do you recall how the defendant that you think you may have recognized was dressed on that occasion?

A No, I don't.

MR. NEWMAN: No further questions.

MR. ROSEN: I have no questions.

MR. DEVICH: I have no further questions, your Honor.

THE COURT: May this witness be excused, gentlemen?

MR. BERGER: No objection.

MR. ROSEN: He wants to be excused?

THE COURT: Yes.

MR. ROSEN: No objection.

THE COURT: Thank you very much for being so patient all morning. We did the best we could. I promised the witnesses the case would be first out, but it wasn't my fault.

MR. DEVICH: Call Esta Georgiade.

[fol. 13] ESTA MAE GEORGIADE

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Esta Mae Georgiade. E-s-t-a M-a-e.

DIRECT EXAMINATION

BY MR. DEVICH:

Q Mrs. Georgiade, you are the wife of the previous witness, Nicholas?
A Yes, I am.
Q You heard his previous testimony?
A Yes, I did.
Q On June 4, 1966, were you at home?
A Yes, I was.
Q In the evening?
A Yes.
Q Did you observe anything unusual happan that evening?
A I was in the bedroom when I heard, actually in the bathroom, right off the master bedroom, and I heard a noise. It sounded like a wrestling match or something like that, and someone said, "Stop fooling around," or "Don't fool around."
[fol. 14] It frightened me. I ran out, and as I ran out, two men met me at my bedroom door.
Q Then what happened?
A Well, the one man that was in the front had a knife over his, kind of over his shoulder, like this.
THE COURT: Holding her right hand up over her shoulder.
THE WITNESS: Yes. And it naturally frightened me. I kind of fell back into the bedroom and said, "Please don't kill me," or something to that effect.
He said, "Lay down on the floor and keep quiet, and you won't get hurt."
Immediately before giving me a chance to do anything or say anything, he said, "Where is your purse?"

BY MR. DEVICH:

Q Where were you at this time?

A In the bedroom.

Q Go ahead.

A I pointed to my bag, which was on a little built-in desk-type thing, and he picked it up, and I said, and at that moment I said, "Please, can I go into the room where my husband is?"

He said, "O. K. Go ahead."

He followed me into the dining area, where my hus-
[fol. 15] band was lying on the floor, and my mother-in-law was sitting beside him, holding a towel on his head.

Q Now, this person that had the knife in his hand, is he in court here today?

A I can't be sure, because he had a mask on his face.

Q Then what happened?

A Well, when I got into the dining room area, one of the men—I don't know which one—told me to get down on the floor and keep my head down.

My little dog was barking, and I picked her up and put her in my arms and sat down beside my husband and kind of laid over on top of him. I had my face down, but I guess I am just curious, so I kept looking up. I saw the men. Two of the men were in the bedroom most of the time. As a matter of fact, they kept changing. The one guy that was holding the gun on us remained in that position. The other three men kept switching around. One time one would be at the door, and the next time another one would be at the door, and they kept going back and forth.

Q You indicated that the one with the knife in your bedroom went and obtained your purse.

A Yes.

Q Did you have some property in that purse?

A Yes.

[fol. 16] Q What?

A My wallet and my card case.

Q Did you have any money in that wallet?

A Yes. I had $40.

Q Is the person in court here today who was holding the gun?

A The man was wearing a mask.
Q With the gun?
A Yes, that was holding the gun on us.
Q I show you People's 1 for identification. Is this similar in nature to the gun that you saw?
A Yes, it is.
Q I show you People's 2 for identification. I'm sorry. Three.
THE COURT: Three.

BY MR. DEVICH:

Q Are these similar in nature to the ones that you saw in the hand of the masked person?
A Yes.
THE COURT: Were they open, the blades extended?
THE WITNESS: Yes.
THE COURT: You started to say something about, I think you were cut off, about identification of the man who had the mask on holding the gun. Did you see any part of his face?
THE WITNESS: Well, I could naturally see his [fol. 17] eyes, because there were holes cut in the mask for him to see. I noticed that the mask kept sliding to one side, and I noticed he had a large bridge to his nose.

BY MR. DEVICH:

Q I show you People's 6 for identification. Are these similar in nature to the masks that the two gentlemen had?
A Yes.
THE COURT: Does this person resemble any one of the defendants that we have before us this morning?
THE WITNESS: Well, I can't be positive. I really would rather not say, because I can't be positive about that, Your Honor.
THE COURT: All right.

BY MR. DEVICH:

Q There were two gentlemen without masks, is that correct?
A Yes.
Q Did you ever see anything in their hands?

A They all had weapons at one time or another, but, I don't know. It seemed like one time I saw one with a gun, and the next time saw that same man with a knife, so I don't know if they were passing the weapons back and forth or what they were doing.

Q Is there anybody here in court today that was at that location that evening?

[fol. 18] A Yes. The man in the white shirt.

Q Mr. Baum?

THE COURT: Baum.

THE WITNESS: Yes.

BY MR. DEVICH:

Q What part did he play in this episode?

A At one point I saw him with the little gun, that little one there, in his hand.

Q Is that People's 2 for identification?

A Yes. And at another point I saw him with a knife in his hand.

Q Was it similar in nature to the two knives People's 3?

A Yes. I can recognize him simply because he didn't have a mask on his face, and he was standing in the doorway that leads into the hallway, which was right over me, and I looked up at him. He had a black sailor's watch cap on, pulled down over his ears.

Q I direct your attention to Mr. Bader, seated at the far left of the counsel table. Does he resemble in any nature any of the fellows at your home that evening?

A The one with the red shirt on?

Q No. The gentleman with the green jacket, sitting at the far left of the counsel table.

A Yes. He looks very much like the man who was [fol. 19] holding a gun on us most of the time, standing in front, you know, right close to the front door.

THE COURT: He had a mask on?

THE WITNESS: Yes, sir.

THE COURT: Could you see under the mask?

THE WITNESS: No, but his eyes, his eyes and his nose look similar to the man that was holding the gun on us.

THE COURT: All right.

BY MR. DEVICH:

Q Did you subsequently find that your money was missing from your wallet?

A Yes. Well, they took everything out of my wallet and just kind of strew it all over the dining room table.

Q Was the money gone?

A Yes.

Q I show you this camera, People's 4 for identification. Will you please examine it and see whether or not this is your camera?

A I would saw it's mine. It's exactly like the one I had.

Q Was it at your house on that evening?

A Yes.

Q Was it taken by any of these gentlemen?

A Yes.

[fol. 20] Q Did you provide anybody with the number for that particular camera?

A Yes, I did.

Q Whom?

A It was Sergeant Gastaldo.

Q Did you give anybody permission to remove your money or to remove that camera from that house?

A They asked me for the money. No. As a matter of fact, he asked me for my bag. When I pointed it to him, he took the bag and dumped everything out and took the money out of the wallet.

Q So you didn't give him permission?

A No.

Q Were you afraid at the time?

A I was scared to death.

Q Did you see the defendants or the subjects at your house leave?

A No, because before they left they told us to keep our heads down, and I did. At that point I was too afraid to raise my head again, so I did keep my head down then.

Q So when you looked up, they were all gone?

A Yes. My husband said to me, "Are they gone?"

I said, "I think so."

And I looked up, and I didn't see them, so I assumed that they were gone. We had heard the door close.

[fol. 21] THE COURT: You say you did hear the door close or you didn't?

THE WITNESS: I did hear it close.

THE COURT: You did?

THE WITNESS: Yes, sir. I did see the one man who picked up the radio and tucked it under his arm. I don't know which one it was, but I saw a man pick up the radio and tuck it under his arm.

BY MR. DEVICH:

Q Was he masked or unmasked?

A I can't remember.

MR. DEVICH: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. BERGER:

Q Did you see the man who took the camera?

A No. This camera?

Q Yes.

A No. This camera, it's a little panel bedroom that I use for a sewing room, and it was in there. I wasn't in that room while the defendants were there that night, so I don't know. I didn't even know it was missing, as a matter of fact, until the next day.

Q So it wasn't taken on that night to your knowledge, is that correct?

[fol. 22] A Not to my knowledge. It was there that day, because I had been sewing all day.

Q You did see it that day. What about this money? Was there any money taken out of your wallet in your presence? Did you see the money taken out of your wallet?

A No. Not actually. I saw them taking things out my bag, and they took all of my cards out of my card case and threw them around on the table.

Q You cannot identify anyone else other than the identification that you have made when you previously testified this afternoon, is that right?

A Yes.

MR. BERGER: Nothing further.

CROSS-EXAMINATION

BY MR. NEWMAN:

Q Did Mr. Baum have any conversation with you? Did he talk to you, this gentleman to my right?
A No.
Q Do you recall how he was dressed except for this cap?
A No. I don't.
MR. NEWMAN: I have no further questions.

[fol. 23] CROSS-EXAMINATION

BY MR. ROSEN:

Q What color eyes did you recognize Mr. Bader as having?
A I was far enough away and the light was dim enough that I couldn't see the color of his eyes.
Q You couldn't see the color of his eyes?
A Just the shape of his eyes and the shape of the bridge of his nose, sir.
Q Which one of these two hods was he wearing?
A Well, I don't think I could be positive about that. They are so similar. This one looks to me like it might be the one, but I wouldn't swear to it.
THE COURT: Which one is she showing?
THE WITNESS: This one.
MR. ROSEN: P-1.
THE COURT: P-1. All right.

BY MR. ROSEN:

Q Just the general shape of the eyes, you say, that makes you believe that it was Mr. Bader that was holding that gun?
THE COURT: No. She didn't say that.
THE WITNESS: Yes, sir. I did say that.
THE COURT: She said the shape of the eyes and the bridge of the nose.
MR. ROSEN: And the bridge of the nose.

[fol. 24] THE COURT: There were two things.
THE WITNESS: Right.

BY MR. ROSEN:

Q What you are saying is that they resemble?
A That is right.
Q Mr. Bader?
A That is what I said, or that is what I meant to say.
MR. ROSEN: I have nothing further.
THE COURT: All right.
MR. DEVICH: I have nothing further.
THE COURT: Call your next.
MR. DEVICH: Mrs. Bertha Georgiade.

BERTHA GEORGIADE

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Bertha Georgiade.
THE CLERK: Your first name, please?
THE WITNESS: Bertha.

DIRECT EXAMINATION

BY MR. DEVICH:

Q Mrs. Georgiade, were you residing with your son, [fol. 25] the previous witness, Nicholas Georgiade, at 119[illegible] Laurel Hills, in Studio City?
A Yes.
Q Were you there on the evening of June 4, 1966?
A Yes.
Q Will you tell the Court what happened at that location?
A Well, that night we were watching some story, and we hear the door, and my son gets up next to me, and he opened the door, and still I was watching the movie. I saw four boys, young fellows, and two was with white hoods, and he was talking, but I don't pay no attention, you know.

Then I hear, you know, "Lay down," something. I gets up and runs, and so my son was down on the floor. I was so scared I couldn't turn to look.

The fellow told me, "Lay down, and you don't get hurt."

THE COURT: Lay down and what?

THE WITNESS: "Lay down, and you don't get hurt."

I laid down, and I told him I was going to lay down next to my son.

He said, "O. K."

I laid down to him, and I saw the blows.

I said, "Please, I am going to pull my dress to put on [fol. 26] his head, because he is bleeding."

I lifted my dress, and I put it on his head, and my hand was full of blood. I turned my head, not to look at no one, and I show my hands full of blood.

I ask him, "Please, anybody give me a towel."

One fellow went and got a towel.

After that my daughter-in-law had to lay down next to him, too.

THE COURT: Brother-in-law?

THE WITNESS: My daughter-in-law. I couldn't turn to look at no one, because I was so scared, and my boy was bleeding. I don't know what, and blood was in my hands, and my dress, the towel, and that is all.

They were asking, you know, for money.

BY MR. DEVICH:

Q Did one of them ask you for what?

A Money.

Q Was this one with a mask or without a mask?

A I don't turn to look at no one, because I was so afraid.

I told him, "In my bag, white bag, I have $10 in change."

Well, they went and looked and couldn't find.

THE COURT: Who did?

THE WITNESS: The fellow, they asked me for money, and I told them where I have the money, in the [fol. 27] closet in my bag. I have $10 in change.

BY MR. DEVICH:

Q Were you in the front room at that time?

A Yes, laid down between living room and dining room by the door.

Q They asked you for money. Then what happened?

A They came back and said, "No money there."

I said, "Yes, is $10 in change in my bag in my wallet."

He said, "Get out and walk slow."

THE COURT: He said?

THE WITNESS: Yes, the boys. One. I don't know which one.

THE COURT: All right.

THE WITNESS: And I get up. There were two boys. I walked in my bedroom, and I saw my bag was open, and the wallet, the change was gone. I said, "There was $10," but I was looking again.

I opened the zipper and I find the $10, and he took it. He said, "O. K. Go back and lay down."

BY MR. DEVICH:

Q These two fellows, did they have masks on?

A I couldn't turn my head to look, because I was so scared.

Q Did you see anything in their hands?

A I saw a gun, two guns, but I don't see the knives. [fol. 28] I don't know. I saw the one, he was holding a gun, and the other one, one big, one small, but I was so scared.

Q Did you see any of the guns when you were taken or when you went from the front room to the bedroom?

A Yes. What is that? Excuse me.

Q The two fellows that went with you from the front room to the bedroom, did you see any guns in their hand?

A Yes.

Q At that time?

A But I don't know now. I was so mixed up. I saw the guns, but who had what it was, I was just shaking all over. I couldn't hold myself. That is all I know. I come back, and I put my head down and I couldn't.

Q One of them took your money from the purse then, is that correct?

A They opened my bag and took the change and couldn't find the $10. They asked me to get up.

Q Excuse me. When you were in the bedroom, did somebody take your money from your purse there?

A It was empty, open, but they couldn't find in the wallet the $10. I opened and give it. He threw it like that, you know.

I said, "Here is the ten."

Q Then what happened after that?

[fol. 29] A They make me to walk back and lay down again next to my son.

Q Then what happened?

A Well, they was walking around. Just as I was looking, you know, I was down, but I hear they were walking down every room, and they were looking for more money. I hear he say, one, "We have got to find more money or we won't leave the house. We should find more money." A couple of times.

I said he had $40 from my daughter-in-law, a couple of dollars, a few dollars from my son, and $10 from me. That was not enough. They come back.

Q How far is it from the front room to the bedroom?

A Well, I think, I am not sure, maybe 20, 25 feet.

Q Now, did these men leave?

A After so long they was looking all over and asking for money and more money.

THE COURT: He didn't ask you that. Did they finally leave?

THE WITNESS: They leave. Yes.

BY MR. DEVICH:

Q Did you see them leave together?

A I hear. Yes. Yes.

MR. DEVICH: I have no further questions, your [fol. 30] Honor.

CROSS-EXAMINATION

BY MR. BERGER:

Q Mrs. Georgiade, you heard them leave or saw them leave?

A I hear. My head was down and I hear each one,

and he said, "Nobody get up or do anything before we leave."

And we said, "No," and everybody leave. They pulled the door closed, and after we get up.

Q Now, somebody asked you if you had money, and you said you had some money in your purse, $10, is that right?

A Yes.

Q Then you went into the bedroom where you keep the purse or you went where where you keep the purse?

A In my bedroom. I don't want. They make me to go.

Q What do you mean they made you to go?

A Yes. They couldn't find the money.

I said, "I'm sure I had it in my pocketbook, white pocketbook, long."

I have my pocketbook, this one.

Q That is the pocketbook?

A That is right. They couldn't find, because the wal- [fol. 31] let that I have, it's not called a wallet.

Q Excuse me. Were you in the bedroom at that time or were you still in the living room?

A No. I was in the living room, laying down. The time they couldn't find, they come back and told me, "No money over there. We look."

I said, "I'm sure I have money," and it was in the zipper here.

Q Was it at that time that you went to the bedroom?

A They told me, "Get up and show us, but walk slow."

Q Do you know who told you to get up and show?

A No. I didn't turn to look at the faces.

Q Then when you got to the bedroom, did someone tell you to leave the bedroom and go back into the living room?

A They make me walk again, to go lay down.

Q Someone told you to leave?

A Yes.

Q You can't identify any one of the people that were in the house that evening besides yourself, your son, and your daughter-in-law, is that correct?

A Yes.

Q When you said "young men," you don't know whether they were young men or old men?
[fol. 32] A Oh, he was young, very young.
Q How do you know they were young men?
A I can tell.
Q How? You didn't see their faces?
THE COURT: You saw two of their faces, didn't you?
THE WITNESS: Yes. The time I walked from the living room I was watching television and to go to the room, there were four together, and I looked like that, and I saw my boy on the floor.
And he said, "Lay down. You don't get hurt."
One had the hood, blue, black. I don't know.

BY MR. BERGER:

Q Was that over his eyes, that cap?
A Yes.
Q You saw two faces, did you?
A Yes.
Q And those two faces looked young to you, is that right?
A Yes. He was young. It was not an old man.
Q About how old did they look to you?
A Well, I would figure 20, over 20; something like that.
Q But the other two faces you didn't see the faces that were covered by a mask, is that correct?
[fol. 33] A No.
Q You don't know whether they were young or old, is that right?
A Well, I can't say.
Q Is that true?
A That is true. I mean I was so scared. That is all.
MR. BERGER: Nothing further.
MR. NEWMAN: Nothing further.
THE COURT: Anything else?
MR. DEVICH: I have nothing further of this witness.
MR. ROSEN: I'd like to ask a few questions.

CROSS-EXAMINATION

BY MR. ROSEN:

Q Mrs. Georgiade, when they first came on the scene, they told you to lay down, is that right?
A Yes.
Q Is that when you laid down alongside of your son?
A Yes.
Q That was in the living room?
A Yes. Like dining room and living room is the same thing, yes. It's a big room. Yes.
Q Your purse was in your bedroom?
[fol. 34] A Yes.
Q They asked you where your purse was?
A Yes.
Q You told them in the bedroom?
A Yes.
Q They then went into the bedroom and came back and told you there was no money in the purse?
A Yes.
Q You told them there was money in the purse?
A Yes. They took the change and they couldn't find the $10.
Q You told them that you would get the $10 for them?
A No. I didn't say that. I said, "I'm sure I have $10 in my bag there."

They said, "Get up slow and show" or "give" or something like that.

So I gets up and I walked and I went in my bedroom, and I see my bag open. I opened this little bag. I had my $10, and I gave it. With the zipper.

Q Then you walked back to where you were?
A Yes.

MR. ROSEN: That is all I have, your Honor.

MR. DEVICH: I have no further questions of the witness.

THE COURT: All right.

[fol. 35] MR. DEVICH: The People call Scott Armstrong.

SCOTT LEE ARMSTRONG

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Scott Lee Armstrong.

DIRECT EXAMINATION

BY MR. DEVICH:

Q Scott, what is your home address and phone number?
A 11831 Laurel Hills Road, Studio City.
Q The phone number?
A 763-2202.
Q How old are you, Scott?
A Fifteen.
Q On June 4, 1966, were you in the area of 11935 Laurel Hills?
A Yes, I was.
Q Around 10:30 in the evening?
A Yes.
Q Did something happen at that location about that time?
A Yes.
[fol. 36] Q Tell the Court what.
A Vince Evans and—
THE COURT: Who?
THE WITNESS: Vince Evans, we were leaning against the car that they used to get away in, and we were talking about—
MR. BERGER: Objection. I move to strike as a conclusion.
THE COURT: Yes. You are getting to the end of the story before the first. Did you see the defendants?
THE WITNESS: Yes. We were leaning against the car, and we heard the door shut, and we heard this running.
I said, "We'd better get off the car. It must be their's.

MR. ROSEN: Just a minute. I will object to anything that he said.

THE COURT: Yes. That will be stricken.

MR. ROSEN: It is hearsay.

THE COURT: Don't say what you said to Vince.

THE WITNESS: O. K.

THE COURT: Just tell us what you saw.

THE WITNESS: Well, I got up from the car.

THE COURT: You were leaning against an automobile?

[fol. 37] THE WITNESS: Yes.

THE COURT: Then you saw or heard?

THE WITNESS: I heard these men running out, and—

THE COURT: How many did you see?

THE WITNESS: Well, I saw four.

THE COURT: Running out of where?

THE WITNESS: Running out of the driveway from the victim's house.

BY MR. DEVICH:

Q Do you know Mr. Georgiade?

A I know him, yes.

Q Do you know that particular house is his house?

A Yes.

Q Then what did you see, Scott?

A Well, saw these four men, running out, and they looked like they were dressed in black, and I saw a gun. So I got up from the car, and I started to walk toward the back of the car, to get the license plate, and just as I got to the back of the car two men came around, and they started pushing us, pushing me.

They held a gun up to me and they said, "Get back and start running down the driveway."

So I turned around and went down the driveway.

Q Could you tell how these four people were [fol. 38] dressed?

A It looked like they were dressed in black. I saw two of them. Two got in the car, and the other two came out to get rid of Vince and I. I saw two. One had a gun,

and I didn't see if the other one had anything, and they were dressed in what looked like black clothes.

Q Scott, I show you People's 1 for identification. Is this similar to the gun that you saw there?

A Yes. It is just the same. Almost, to the best of my ability.

Q Did any of the men have masks?

A No. I didn't see any masks on them. On one I saw, it looked like he had something under his arm, but he went and got in the car.

Q Are there any gentlemen here in court today that you saw coming from that house on that evening?

A The one in the green and the one in the white are the two that came, I think are the two that came, toward us.

THE COURT: Identifying Bader and Baum.

BY MR. DEVICH:

Q What kind of a car was this, Scott?

A It was a, it looked, a very light colored Chevy Impala.

THE COURT: Did you get the license number?

[fol. 39] THE WITNESS: No, I didn't. Just as I was getting to the back of the car, that is when they came around.

BY MR. DEVICH:

Q Do you know what year the car was?

A '65. At first I thought it was a '66, but it turned out to be a '65.

Q About what time of the evening was this?

A At 10:30. After they had left I went in and called the police, and just I made the phone call, it was just 10:30.

MR. DEVICH: I have no further questions.

CROSS-EXAMINATION

BY MR. BERGER:

Q Scott, you said you first thought it was a '66. Now you find it's a '65. How did you find out it was a '65?

A Well, I remembered what the car looked like. Just telling my brother what happened, and he asked me what kind of car it was and what the back end looked like, and it just came to be a '65. At first I thought it was a '66. It looked very new.

Q You talked to your brother, and between the both of you you decided it was a 1965 car?

A It was a '65. It was a mistake on my part first, [fol. 40] thinking it was a '66.

MR. BERGER: Nothing further.

CROSS-EXAMINATION

BY MR. NEWMAN:

Q Were there any street lights on that street on which you were standing?

A On the street, on our street there are no lights, but at the base of the street there is one light. This is on Laurel Canyon. There was a light from the victim's house, and a small kitchen light from the house across and down one.

Q What kind of light from the victim's house? Was that the light on the interior of the house?

A No. It was the light on the porch, but the biggest, the most light there that night was coming from the moon. An extremely bright night.

Q You say you thought the gentlemen to my right was dressed in black?

THE COURT: He said he thought they were all dressed in black.

THE WITNESS: This is what it looked like. As they came running out of the driveway, the light was behind him, and they were moving fast. It was black or very dark, is what it looked like.

[fol. 41] BY MR. NEWMAN:

Q The gentleman to my right, was he bareheaded?

A As I remember, he had, I know one of them, the one that had the gun had a sort of a black hat on his head, sort of like a sock or something like that. I am pretty sure it's the one with the gun.

Q When did you go in to make your telephone call to the police?

A Well, they said to go down this driveway, and I went running down the driveway. It's about a 75 foot long driveway. I got to the end, and I knocked on the door at this particular house, and she is a neighbor of mine, but she didn't recognize me.

THE COURT: That is where you made the call from?

THE WITNESS: No. She wouldn't let me in, so I left, and I went home and called.

BY MR. NEWMAN:

Q At your home?

A Yes. About four minutes after.

MR. NEWMAN: No further questions.

CROSS-EXAMINATION

BY MR. ROSEN:

Q Was this car parked no the street?

A Yes, on the street. The house. Then there is a [fol. 42] small bridge. Just the other side of the bridge.

Q How far from the Georgiade house?

A From the house itself, well, from where the driveway is, it's about 25 feet.

Q From the porch light how far?

A From the porch light you have to go down a driveway to the street and down the street. From there I'd say it's about 75 feet from the house to the car.

Q So no illumination from the porch light—

A I can't see the porch light from the street.

Q When all these people rushed down, this occurred in less than 30 seconds time, didn't it?

A Yes.

Q Two of them rushed up to you?

A Well, the first thing I saw was when they got onto the street. This is when I saw them coming out of the driveway. Then they started moving toward the car. This is when I saw them the second, well, I was still

looking at this time. Two got in the car. Another two came around.

Q Came around toward you and your friend?

A Yes, very close to me. This is when I saw them.

Q They told you to get moving?

A Right.

Q And you got moving?

[fol. 43] A Right.

Q This man that you say resembles Bader here to my right, was he wearing anything over his face or head?

A Nothing over his face. It looked like he had a hat on his head.

Q It looked like he had a hat on his head?

A A sailor's hat or something like that.

Q You just got a pretty fast glimpse of him, is that right?

A Well, he was very close to me, because he hit me in the chest.

Q With what?

A With his fist.

Q With his fist?

A Yes.

Q Did he have a gun?

A In the other hand.

Q He had a gun in one hand, and he hit you in the chest with his other hand?

THE COURT: That is what he said.

THE WITNESS: Yes.

THE COURT: That is the way I have got it written.

BY MR. ROSEN:

Q How tall was this man? Was he taller than you?

[fol. 44] A Yes, about approximately six inches taller. The other man was just about as tall as I am. Maybe a little bit shorter.

Q How tall are you?

A Five-six, five seven.

MR. ROSEN: That is all I have.

MR. DEVICH: I have no further questions.

The People call Officer Gastaldo.

ALBERT J. GASTALDO

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Albert J. Gastaldo. G-a-s-t-a-l-d-o.

DIRECT EXAMINATION

BY MR. DEVICH:

Q Officer, what is your occupation and assignment?
A Police officer for the City of Los Angeles, assigned to North Hollywood Robbery Detail.
Q Are you one of the investigating officers in this matter?
A I am.
[fol. 45] Q Are you also one of the arresting officers in this matter?
A On one of the defendants I am.
Q What defendant was that?
A Baca.
Q During the course of your investigation, did you have some information on this particular investigation?
A I had some information, yes.
Q What?
A Information that a Van Nuys radio car had made an arrest, and in the arrest, the arrest was made for narcotics, but in the vehicle there was some property that was taken in this particular residence robbery.
MR. BERGER: An objection to this unless it is limited to probable cause.
MR. DEVICH: This is limited to probable cause.
THE COURT: Yes. This is limited to probable cause.

BY MR. DEVICH:

Q Go ahead.
A And two of these people were in custody at Van Nuys.
Q Who were these two people?
A This was the defendant Baum and Bader.

[fol. 46] Q Was there also a car involved in this matter?

A Yes. I checked, and the vehicle that was being driven by Baum or Bader, I don't recall which the driver was, actually belonged to Archie Hill.

Q You indicated some property was in that vehicle at the time, which came from a residential burglary?

A No. Residential robbery. People's Exhibit 6, I believe. The radio.

Q This People's 5 for identification, is that the radio?

A That is it.

Q Go ahead.

A With this I had a conversation first with Mr. Bader. This took place on —

THE COURT: This is for all purposes now?

MR. DEVICH: No, your Honor. This is limited to probable cause.

THE COURT: All right.

MR. ROSEN: Probable cause for what?

MR. DEVICH: There should be probable cause to show the arrest of one of the particular defendants involved, your Honor.

THE COURT: Let's see what it is. I don't know. I have no idea. I can't outguess him.

THE WITNESS: It took place on June 6 at approximately 5:30 P. M. at Van Nuys Jail. Present at that [fol. 47] conversation was Mr. Bader and myself. I advised the defendant that he had a right to counsel, that anything he said could be used against him later at a criminal proceeding, and he did not have to talk to me unless he wanted to.

BY MR. DEVICH:

Q Did you tell him whether or not he had the right to a Public Defender?

A I did not.

Q Who was present?

A The defendant and myself. He in substance told me—

THE COURT: Just a minute.

MR. ROSEN: I am going to object to the conversation, your Honor.

THE COURT: It will be sustained, if it's a confession. I suppose it is.

MR. DEVICH: Our position would be it is not being offered for the purposes of a confession. It is being offered for the purpose of the probable cause to show that it tended to tie up one of the defendants, the defendant Hill, in this matter.

MR. ROSEN: If it's inadmissible—

THE COURT: As to one it would be inadmissible as to all.

MR. ROSEN: It would be inadmissible as to all for [fol. 48] all purposes.

THE COURT: I think so.

BY MR. DEVICH:

Q Did you have an occasion to go to Mr. Hill's residence?

A Yes, prior to this.

Q Prior to the conversation?

A Prior to going to Mr. Hill's residence, I did some further checking.

Q What checking was that?

A I checked with our local field interrogation files at Van Nuys, West Valley, and North Hollywood. I found shake cards, which associated Mr. Hill with Mr. Baum and Bader.

MR. BERGER: An objection to that and a motion to strike as being irrelevant and immaterial and hearsay.

MR. DEVICH: Limited to probable cause.

THE COURT: He can investigate the record to find out if there is any association between men. There is no limit to that.

MR. BERGER: This is limited to probable cause only?

THE COURT: Yes. That is all it is now.

BY MR. DEVICH:

Q Did these field interrogation cards reveal an address?

[fol. 49] A Yes, they did. 1911 Sepulveda Boulevard, apartment number four, as belonging to Mr. Hill.

I further had some information from Sergeant Ide, at Van Nuys Detectives, that these defendants were involved in various robberies throughout the Valley. I was further led to believe that there was additional property from this robbery located at Archie Hill's apartment.

MR. BERGER: I will object to that, your Honor, he was further led to believe.

THE COURT: Yes. You will have to be more explicit. Who led you to believe this?

THE WITNESS: I was led to believe this from the fact that this radio was in the car at the time Baum and Bader were arrested and was merely one piece of property which was taken in this robbery.

THE COURT: Overruled.

THE WITNESS: With this I proceeded to Mr. Hill's apartment.

BY MR. DEVICH:

Q Do you recall what date that was?

A Yes. That was on June 6, 1966, at approximately 10:30, between 10:15 and 10:30 P. M. I was accompanied by Sergeant Ide, of Van Nuys, Olson, Welch, from Van Nuys Narcotics, and myself.

We knocked on the door. Mr. Miller, a Mr. Miller, [fol. 50] opened the door. Immediately I recognized that Mr. Miller closely fit the description of several robberies which we were investigating with this group.

THE COURT: You say Mr. Miller?

THE WITNESS: Yes.

THE COURT: Looked like one of the persons?

THE WITNESS: Like one of the suspects listed on one of the robberies we were investigating.

THE COURT: I see.

THE WITNESS: At the same time—

MR. BERGER: Your Honor, I didn't understand the answer. Was the answer that Mr. Miller looked like Mr. Hill, who you were investigating, or Mr. Miller looked like somebody you were investigating?

THE WITNESS: Looked like a suspect.

At the same time we noticed a revolver.

MR. BERGER: Objection to "we noticed" as being a conclusion of the officer.

THE COURT: Yes. Don't say what your partner saw. What you saw. Did you notice it?

THE WITNESS: At the same time I noticed an automatic revolver with a loaded clip, sitting on the coffee table in the front room of this apartment. Sergeant Ide had informed Mr. Miller he was under arrest for robbery.

We entered the apartment. Under the sofa in the [fol. 51] front room Sergeant Ide removed People's Exhibit number 1.

BY MR. DEVICH:

Q Is that the revolver?

A Yes.

Q Go ahead.

A I went into the bedroom. I recovered People's 2 and 3.

Q The Starter gun and the two knives?

A Yes, sir. Also the camera.

Q People's 4?

A Yes, and the hoods.

Q People's number 6?

A Yes.

MR. DEVICH: Your Honor, at this time may the following be marked People's 7 for identification, two sheets of white paper, with writing on it, bearing the initials AG? May they collectively be marked People's 7 for identification?

THE COURT: So marked.

BY MR. DEVICH:

Q I show you People's 7 for identification. Did you find those in that particular apartment that day?

A Yes, I did.

Q Was there anything in People's 7 that was pertinent to this particular investigation?

[fol. 52] A Yes, sir.

Q What?

A May I read verbatim from People's 7?

Q Go ahead.

A At the top of the first page is the numeral seven. It states: "Friday I went out"—

MR. BERGER: We will object to this as being the best evidence rule. The best evidence is the slip of paper itself.

THE COURT: It is already marked Exhibit 7 for identification. He is just reading it into the record. Overruled.

THE WITNESS: "Friday I went out with Gina. Then Saturday night we went out to hold up a market, but when we got there it was closed, so we had to go to a house. We knocked on the door, and when they answered the door we ran in and I had to hit the man on the head with my gun, because he didn't get down on the floor fast enough. We only got about $60 from them. We left from there and went to TJ and scored seven keys. On the way back we pulled over at the roadblock, but they only checked the trunk of the car. We got back home about 6:00 in the morning. I went to bed. Then Dick and one of the guys that made this run with us left my apartment with Dick to go and get something to eat. This turned out to be a mistake, because they [fol. 53] got busted for possession of grass."

BY MR. DEVICH:

Q Did you book all these items after you arrested Mr. Miller?

A Yes, sir.

Q Did you find anything in the apartmetnt which further showed that this particular aparment was Mr. Hill's?

A Yes. In the same drawer where I located People's 7 there were rent receipts, numerous stack of rent receipts at this particular apartment, made out to Archie Hill, and there were several other pieces of paper, correspondence, notes from girls, and so forth, all to an Archie or an Archie Hill.

Q I think you indicated you arrested the defendant Baca?

A Yes, I did.
Q When?
A On June 7 of this year at approximately 11:00 P. M.
Q Where did the arrest take place?
A At 14432 Sylvan Street, Van Nuys.
Q Is that the Police Station?
A No, it isn't.
Q What is it?
A It's a red, white, and blue print shop.
[fol. 54] Q Did you have a conversation with Mr. Baca?
A Yes, I did.
Q Was this after or prior to his arrest?
A It was after his arrest.
Q Did you advise him of his constitutional rights?
A Yes, I did
Q What did you tell him?
A I advised him that he had a right to an attorney, that he didn't have to talk to me unless he wanted to, and that anything he did say to me could be used against him in a subsequent criminal proceeding.
Q Did you indicate to him that at that time he had a right to a Public Defender?
A I did not.
MR. NEWMAN: I move to strike any testimony.
THE COURT: He hasn't said anything yet.
MR. BERGER: May any conversation be limited only to that?
THE COURT: It's not going to be admitted anyhow. Don't worry about it.
MR. DEVICH: I won't take the Court's time, then, by trying to have the statement put in.
THE COURT: No. You are spinning your wheels.

BY MR. DEVICH:

Q Did everything that you testified to occur in the [fol. 55] County of Los Angeles?
A Yes, it did.
MR. DEVICH: I have no further questions.

CROSS-EXAMINATION

BY MR. BERGER:

Q You didn't have a search warrant to search that apartment on that night, did you officer?

A No, sir.

Q You didn't have a warrant for the arrest of Mr. Hill or for any occupant at that apartment, did you?

A No, sir.

Q You didn't have a warrant to search any person who was in that apartment on that evening, did you?

A No, sir.

Q You didn't have permission to enter that apartment either that evening, did you?

A (No response).

Q Did anyone give you permission to go in?

A I don't recall whether Mr. Miller asked us in the apartment or not.

Q Did you have your guns out?

A No.

Q Did you show them your badge?

A I didn't, no.

[fol. 56] Q Did someone show a badge?

A Yes.

Q Who showed a badge?

A Sergeant Ide.

Q You were in plainclothes?

A Yes.

Q At what point did you decide to take the gun out?

A I don't know that I ever took my gun out.

Q How about your partner? Did he ever have a gun out?

A Counsel, I will answer that no, if I may explain.

Q No. That is enough.

THE COURT: You have a right to answer yes or no and explain your answer. That has always been the law.

THE WITNESS: No, we did not have hand guns out. However, we did have, as I recall, two shotguns.

BY MR. BERGER:

Q When you went to the apartment, you were holding a shotgun?

A I wasn't, no.

Q Your partner was?

A One of the men was.

Q How many men were there there?

[fol. 57] A Four.

Q Did they hold them up in the air or pointing them at anyone?

A They were just holding them, pointed to the ground.

Q When you went to that apartment at 1911 that evening, was it your intent to arrest the occupants of that apartment?

A I don't know who the occupants might have been. It was my intention to arrest Archie Hill.

Q You said that you found out a car was registered in Mr. Hill's name, is that correct?

A No, I did not.

Q But you did determine prior to that that Mr. Hill was the owner of a certain vehicle where certain people were stopped, is that correct?

A Yes, sir.

Q What kind of vehicle was that?

A A '57 Buick, two door, black, bearing California license PZV 001.

Q You did not determine this by a check of DMV, did you?

A I did not determine it at all. It was determined by another officer.

Q What is that officer's name?

A I don't recall. It could be one of two.

[fol. 58] Q Did you have a conversation with one of the two officers?

A Yes, I did.

Q He told you a certain vehicle belonged to Mr. Hill, is that correct?

A Yes, sir.

Q You made no further check, is that correct?

A No. I did make further checks.

Q Now, you said you saw the gun that is marked People's 1; I believe the long gun. You said you saw that, sitting on the table?

THE COURT: No. He said he saw an automatic, is what I have got.

BY MR. BERGER:

Q An automatic?

A Yes, sir.

Q Where is that automatic? Is that here in court?

A Yes, it is.

Q This automatic, you said it was loaded and you saw it there and you said it was loaded and had the clip in, is that correct?

A No.

Q What did you see?

A It was sitting on the coffee table with a loaded clip, sitting next to it.

[fol. 59] Q I see. The gun wasn't loaded then to your knowledge, was it?

THE COURT: It couldn't be if it's an automatic. You have to have the clip in.

BY MR. BERGER:

Q Did you see this when you were inside the apartment or outside the apartment?

A Outside the apartment.

Q It was at that time that you arrested, you went into the premises and arrested Mr. Hill?

A Yes. That was one of the events that took place.

Q Prior to this time someone had invited you in or was it after you saw the automatic sitting on the table that someone decided to invite you in?

A I don't know that we were ever invited in. I don't recall.

Q When you did go in, it was not because of an invitation? It was because you walked in, is that correct?

THE COURT: He says he doesn't know. He just got through saying.

BY MR. BERGER:

Q You saw a revolver with a loaded clip on the table, is that correct?

A That is correct.

[fol. 60] Q What happened next?

A We arrested Mr. Miller.

Q You went into the apartment and arrested Mr. Miller?

A Yes, sir.

Q Did you arrest anyone else?

A At that time?

Q Yes, at that time.

A No. There was no one else in the apartment.

Q Did you determine at that time that Mr. Miller was renting this apartment?

A No.

Q Did you determine who was renting the apartment at that time?

A Shortly thereafter.

Q That was during the search, is that correct?

A Yes.

Q Neither Mr. Hill nor Mr. Miller gave you any permission to search that apartment, is that correct?

A No, sir.

Q That is not correct, or they did not give you permission to search it?

A We did not have permission.

MR. BERGER: Nothing further.

[fol. 61] CROSS-EXAMINATION

BY MR. NEWMAN:

Q Did you have a warrant for the arrest of either the defendant Baum or Baca?

A I did not arrest Baum, and I had no warrant for Mr. Baca.

MR. NEWMAN: No further questions.

CROSS-EXAMINATION

BY MR. ROSEN:

Q You didn't arrest Bader either, did you?
A No, sir.
MR. ROSEN: That is all.
MR. DEVICH: I have nothing further of this witness.

May the following be marked People's number 8 for identification: Two Los Angeles Police Department exemplar cards, bearing the name Archie W. Hill? May they be marked collectively People's 8 for identification?

THE COURT: So marked.

MR. DEVICH: Will counsel stipulate, for the purpose of the preliminary hearing only, that Roy Kiser was called, sworn, and testified that he is a qualified handwriting analyst for the Los Angeles Police Department, and that he did make a comparison between People's 7 and People's 8 collectively for identification and formed [fol. 62] the opinion that they were made by one and the same person.

MR. BERGER: So stipulated for the purpose of this preliminary hearing only.

MR. DEVICH: Will counsel further stipulate Officer Klesper, K-l-e-s-p-e-r, 3513, was called, sworn, and testified that he was present on the date of December 5, 1965, and observed defendant Hill fill out the Los Angeles Police Department exemplar card part of People's 8 for identification and, finally, that Officer Jelenic, Los Angeles Police Department, 5250, was called, sworn, and did testify that on June 9, 1966, he was present when defendant Hill made out the Los Angeles Police Department exemplar card, bearing the name Archie W. Hill?

MR. BERGER: So stipulated for the purpose of the preliminary hearing only.

MR. NEWMAN: So stipulated for the purpose of the preliminary hearing only.

MR. ROSEN: It doesn't apply to my client. I don't have to.

MR. DEVICH: May People's 1 through 8 be received in evidence, your Honor?

THE COURT: Do you want to make any formal objection?

MR. BERGER: I will make an objection on behalf of my client, Mr. Hill. There will be an objection on [fol. 63] behalf of Mr. Hill that the guns, the letter, I believe the camera, any of the things found in the apartment were the product of an unlawful search and seizure, and a motion to quash.

THE COURT: Motion denied.

MR. NEWMAN: I move to dismiss as against Jerry Edward Baca on the ground there is no testimony to show even probable cause for binding him over, your Honor. His name was not mentioned in the diary and there was no identification.

THE COURT: Overruled.

MR. ROSEN: I submit it, your Honor, but I must agree with counsel on behalf of Baca that there is no evidence by any of the witnesses tying Baca in, nor is there any statement tying Baca in.

MR. NEWMAN: Your Honor, in the diary, as a matter of fact, certain names are mentioned. There is no mention at all of Jerry Edward Baca. He was not in the apartment at the time, your Honor. He was not identified by any of the witnesses, your Honor.

MR. DEVICH: May counsel approach the bench?

THE COURT: Yes.

(Conference at the bench).

THE COURT: Motion as to Baca will be granted.

MR. BERGER: The same motion will be made on behalf of my client, Mr. Hill, a motion to dismiss on [fol. 64] the ground that there is no corpus delicti shown. There was no one who could identify him at the scene. No one could place him at the scene.

THE COURT: That will be denied.

The other defendants Baum, Bader, and Hill will stand. They are held to answer.

Their arraignment will be in the Superior Court of this County on July 15, 1966, at 9:00 A. M. in Department 100. Five thousand dollar bail for each.

MR. BERGER: There will be a motion on bail, your Honor, on behalf of Mr. Hill.

THE COURT: In view of what has been said about their proclivities to rob people in the Valley and their activities, I will deny the motion. I will not release fellows out to commit more robberies.

MR. BERGER: The only ground is that the defendant Hill has no prior record that I know of, and the fact of the weakness of the prosecution's case.

THE COURT: That hasn't anything to do with it, the weakness of the prosecution's case. If it was that weak, I wouldn't hold him. They are all held on $5,000 bail.

MR. BERGER: What date is that, your Honor?

THE COURT: July 15.

MR. DEVICH: The People have one other motion to make, if agreeable with counsel, to substitute.

[fol. 65] THE COURT: The Exhibits will all be admitted.

MR. DEVICH: A motion to substitute People's number 7, the two white pieces of paper, with photostatic copies of the same writings. They will be available at the time of the Superior Court trial.

THE COURT: Is that all right, counsel?

MR. ROSEN: Yes.

MR. BERGER: Yes.

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

DIVISION NO. 68 HON. GEORGE B. ROSS, JUDGE

No. 900,707

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

ALFRED ELMO BAUM, RICHARD JOSEPH BADER, JERRY EDWARD BACA, (Dismissed), ARCHIE WILLIAM HILL, JR., DEFENDANTS

COMMITMENT—July 16, 1966

IT APPEARING TO ME that the offense in the within complaint mentioned, to wit: CT. I, II Robbery, violation of Section 211 of the Penal Code, CT. III Kidnaping for the Purpose of Robbery, violation of Section 209 P.C., felonies, have been committed and there is sufficient cause to believe the within-named ALFRED ELMO BAUM, RICHARD JOSEPH BADER, and ARCHIE WILLIAM HILL, JR., guilty thereof, I order that they be held to answer to the same and that they be admitted to bail in the sum of $5,000 and that they be committed to the custody of the Sheriff of Los Angeles County until they give such bail.

DATED this 1st day of July, 1966.

GEORGE B. ROSS
Judge of the Municipal Court
Los Angeles Judicial District
County of Los Angeles
State of California
COMMITTING MAGISTRATE

[fol. 4]

IN THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

LOS ANGELES, CALIFORNIA, THURSDAY, OCTOBER 6, 1966, 9:00 A.M.

THE COURT: Hill. The matter has heretofore been submitted on the transcript. The Court has read and considered the transcript.

MR. HERZBRUN: Your Honor, the transcript appears on the Court's bench.

THE COURT: Anything additional?

MR. HERZBRUN: Yes. The People will call as an additional witness a witness who did testify at the preliminary hearing in this matter, Officer Gastaldo. Please take the stand.

ALBERT J. GASTALDO,

called as a witness by and in behalf of the People, being first duly sworn, testified as follows:

THE CLERK: Please be seated and state your name.

THE WITNESS: Albert J. Gastaldo, G-a-s-t-a-l-d-o.

MR. HERZBRUN: Let me say first as a kind of opening statement for the record, we are aware, of course, that the Court has read and considered at an earlier time, not for the purposes of this case but in another case, a transcript on a 995 motion in which the connection between the defendant and that particular crime was to be established by evidence in a certain diary, and the Court did find on the basis of that tran-

[fol. 5] script that the diary was obtained under a search that was an illegal search under current appellate court decisions. However, that transcript is not in evidence here. We intend here to put on the basis of this transcript which is much fuller in that respect. I particularly called this officer here so that we could have a full disclosure of all of the circumstances in that respect, be-

cause that is the central defense here in effect, and the situation is one that is all too current in these cases where it is really the officer who may be on trial here. For that purpose we have called Officer Gastaldo to the stand and I intend to ask him questions and open him up for cross examination or such questions as the Court may desire to put to him on that issue.

MR. BERGER: Might I say this, your Honor, since we are making opening statements—I think the evidence will show that thia defendant was only arrested once. There happened to be two transcripts but there was only one arrest made, only one search made, only one seizure made; so I hope your Honor will keep that in mind no matter what evidence comes out—this man was only arrested once and any divergence between the two transcripts and what the officer says would bear upon the officer as not being credible.

THE COURT: Of course I had to act on the first transcript solely on what was in that transcript. I don't [fol. 6] know what might have been adduced if the People had seen fit to call the officer at that time, and I am not going to pre-judge the officer's testimony merely because we have a case where the defendant Hill apparently got the benefit. Even the People can learn, you know, Mr. Berger.

DIRECT EXAMINATION

BY MR. HERZBRUN:

Q For the record, Mr. Gastaldo, your occupation and assignment?

A Police officer for the City of Los Angeles assigned to North Hollywood Robbery Detail.

Q How long have you been a policeman?

A 11 years approximately.

Q You were one of the officers that obtained this diary that is referred to in the transcript of the preliminary hearing, is that correct?

A Yes, sir.

THE COURT: Just to correct the record, I think the transcript indicates it is only two pages of the diary, is that correct, Officer?

THE WITNESS: Yes.

MR. HERZBRUN: Yes. I am referring now to that sheaf of papers of which the two pages are quoted in the transcript.

THE WITNESS: Yes, sir.

Q BY MR. HERZBRUN: Now at what location was that found?

[fol. 7] A Apartment 4 located at 9311 Sepulveda Boulevard.

Q And what brought you to that location initially?

May I say that any testimony in this regard is to qualify the witness.

THE COURT: Yes, it will be so indicated.

THE WITNESS: Several things led me to believe that the defendant was involved in some robberies in the Valley and one—

Q BY MR. HERZBRUN: Would you relate those—

A One robbery in particular that I was investigating.

Q Which one was that?

A Victim Nicholas George Iade, which occurred at 11935 Laurel Hills Road, Studio City.

Q In connection with that particular robbery, the George Iade matter, did you have some kind of a description?

A Yes, we did.

Q What did that consist of?

A It consisted of four male Caucausians in age group from 21 to 26, all ranging in heights from 5-foot-9 to 5-foot-11; the hair on two of them was dark brown in color, the other two were wearing hoods, had a complete description of the weapons, had a description of a vehicle which was used, which was seen as the getaway car.

[fol. 8] Q What kind of a description did you have on that vehicle?

A Late model Chevrolet, light in color, '65.

Q Any license number?

A No.

Q All right, now, what if any information did you have regarding the location of this apartment 4?

A I determined the location of the apartment by checking out field interrogation cards in which Mr. Hill was talked to by Officers in the field in the company of Mr. Baum and Bader.

MR. BERGER: Objected to as being a conclusion of the officer unless he was present. Motion to strike.

THE COURT: Read the answer again, please.

(Reporter reads answer requested.)

MR. BERGER: Also incompetent, and also hearsay.

THE COURT: Everything after the word "card" will be stricken.

Q BY MR. HERZBRUN: I take it from this card you received certain information, is that right?

A Yes, sir.

Q And what information did you receive from this card?

This is strictly on the issue of probable cause, your Honor.

[fol. 9] What information did this card contain?

A A physical description of Mr. Hill; his address, his birthdate; his business address and the type of vehicle that he had, and the circumstances for which the card was made.

Q You have given us the description you got from this Mr. George Iade matter. Would you tell us what description you got from this card in more detail?

A Going by memory, as I recall he was described as a male Caucasian, either 19 or 20, 5 feet 10 inches, 155, brown and brown.

Q Was there a location indicated on the card?

A Yes. There was more than one card, Counsel, and I don't recall the locations where they were made.

Q Did one of them give you this address, Apartment 4?

A Yes, it did.

Q Was there any information in those cards regarding any vehicle?

A On one of the cards there was.

Q Do you recall what that was?

A Yes, it was a '57 Buick; as I recall it was a two-door black; it had the license number and I checked further and found that it was also the same car that was impounded in our lot on a previous arrest.

Q Now before you went to that location did you [fol. 10] have any other information from fellow officers regarding either the defendant Hill or the location of this apartment 4 on Sepulveda?

A Yes. I had some information from Sergeant Ide who works Robbery in Van Nuys Division.

Q He's a fellow investigating officer of yours, is that right?

A Yes, sir.

Q All right, what information did you have from him regarding this location?

A First, that he had had several robberies in his area and in which the physical descriptions on my robbery, the George Iade robbery, and his, were almost identical; he had told me that he had received some unconfirmed information that Mr. Hill and some other people had some guns in their possession before my crime had occurred; he also informed me that Mr. Baum and Bader were in custody at Van Nuys on a marijuana charge; that the car that they were driving when they were arrested was checked and found to belong to Mr. Hill.

He told me that there was some property removed from the vehicle.

Q Did he indicate what kind of vehicle that was?

A Yes, it was the same 1957 Buick that I was talking about earlier. The license number I don't recall right now.

[fol. 11] Q The one that had been impounded in your lot?

A Yes.

Q Any other information?

(A brief recess to dispose of an unrelated matter.)

THE COURT: You may proceed.

THE WITNESS: Then I checked and found that one of the articles removed from Mr. Baum and Bader's card on their arrest under the marijuana charge was actually

a piece of property which was taken in the robbery of the George Iade residence in Studio City.

Q BY MR. HERZBRUN: What article was that?

A As I recall it was a radio.

Q How did you make that check?

A I checked with the victim. Then I had a discussion with both Mr. Baum and Mr. Bader.

Q Did you get any information from them concerning this either Hill or the location?

A Yes, both.

Q What information did you receive from them?

A Well, from each of them I received a full statement as to what occurred at various robberies and who was implicated in them, and that I could go to Mr. Hill's apartment—they gave me the address again, informed me that the guns used in the robbery were there and also that the remaining property should be in his apartment.

[fol. 12] Q What address did they give you?

A 9311 Sepulveda, and Mr. Bader also informed me that he was sharing that apartment with Mr. Hill.

Q All right, then when did you go to the apartment?

A I went to his apartment on June 6th of this year. As I recall it was in the evening. I don't recall the time.

Q That was your first time at the apartment?

A Yes, it was.

Q You were there more than two times, is that right?

A No, I was only there one time.

Q Just that one time?

A Yes.

Q All right, and approximately what time was that in the evening?

A I'd have to check my report, Counsel.

Q Do you have your report with you?

A Yes.

Q These reports were made by you at the time or shortly after the time you were there?

A Yes, they were.

Approximately 8:15 is when we knocked on the door.

Q In the evening, is that right?

[fol. 13] A Yes.

Q And—

THE COURT: Just a minute. Did you say "pounded" on the door?

THE WITNESS: "Knocked."

Q BY MR. HERZBRUN: You said "we"—I take it there were others with you, is that right?

A Yes, that's right.

Q Who was with you?

A Sergeant Ide from Van Nuys, Sergeant Olsen from Van Nuys Narcotics, Sergeant Welsh from Van Nuys Narcotics.

Q Were you in uniform at the time?

A No, sir.

Q All right, when you knocked on the door what happened next?

A Well, before I knocked on the door I checked something further.

Q What did you check?

A I determined that Apartment No. 4 was being occupied by an Archie Hill.

Q How did you check that?

A By mail box and one of the officers asked one of them—as I recall, children that were in the area of the apartment house. It was a simulyoneous thing.

Q Then after you knocked what happened?

[fol. 14] A The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and from Baum and Bader, answered the door.

Q Let me ask this—had you yourself on any previous investigations or at any time ever seen Mr. Hill? Had you personally ever seen him?

A I had no idea what he looked like.

Q Other than of course the descriptions you had—but you yourself had never seen him before?

A Right.

Q Did you identify yourself as police officers?

A Yes.

Q Did you tell this individual what you were there for?

A Yes, we did eventually.

Q At the time when he answered the door what did you do?

A We placed him under arrest for robbery.

Q At that time you thought you had Hill, is that correct?

A Yes.

Q All right. Did you enter the home then?

A Yes.

Q The apartment, I should say. Was there anybody else in the apartment?

[fol. 15] A No, sir.

Q Briefly what kind of an apartment is this? How many rooms, more or less?

A There was a living room, kitchen area, one bedroom and a bath.

Q When you checked the mail box did you find any other names on that mail box earlier, other than Hill's?

A No, sir.

Q Incident to your arrest of this individual did you make any search of the immediate premises there?

A Yes, we did.

Q Did you find anything indicating or that might indicate that Hill resided there?

A Yes, there were numerous—

Q What did you find?

A Numerous rent receipts, personal correspondence, all in the name of Archie Hill and also in the name of Dick Bader in another location. We also found property which was taken in the George Iade robbery in the apartment. Found guns of the type which were used in the robbery, the George Iade residence; also knives.

Q Did you have any conversation with the man you arrested there? Did you ask him whether he was Hill, for example?

A Yes, we did.

Q What did he say?

[fol. 16] A He said that his name was Miller and that he didn't live there, and that he had no knowledge of what was in the apartment; he had never seen any guns; to his knowledge he knew nothing about them. I asked

him how he could not have any knowledge when prior to our arresting him we observed an automatic laying on the coffee table in plain sight and fully loaded clip right next to it—

Q Did he reply to that?

A Yes, he did.

MR. BERGER: Your Honor, might I inquire at this time for what probable cause this evidence is being sought to be introduced at this time? Apparently there's already been an entry and there's been an arrest, so I was wondering what the District Attorney had in mind at this point.

THE COURT: Miller was in fact arrested and the information which the officer obtained from Miller might very well have justified a further search. I don't know what the evidence is going to reveal and I will admit it now for the very limited purposes of ascertaining the state of mind of the officer subject to a motion to strike.

MR. HERZBRUN: Will you please read the last question back?

(Reporter reads question and answer)

Q (To reporter) That is in reference to the gun?

THE REPORTER: That is correct.

Q What did he say with reference to the gun?

[fol. 17] A He made a reply, Counsel, but I don't recall what it was.

Q Did you ask him any questions as to whether Hill was, or what he was doing there, or anything of that sort?

A First I questioned him as to his identity, so as to make sure he was not Mr. Hill; he told me his name was Miller; that he didn't know where Archie Hill was; that Archie Hill did in fact own the apartment there, or lived in the apartment, and that he was just sitting around waiting for him; that to his knowledge there was no one else in the apartment but him.

Q Did he say how he got into the apartment?

A No, he did not.

Q Did you ask him that?

A Yes.

Q Do you recall whether he replied at all?

A Yes, he said that he just came in and was waiting for Mr. Hill.

Q Incidentally, is there a lock on the door to the apartment?

A Yes, there is.

THE COURT: Did you ask him if he had a key?

THE WITNESS: No, sir, I did not. I don't recall if I did.

Q BY MR. HERZBRUN: Did he produce any iden-
[fol. 18] tification?

A Yes, he produced some type of identification which showed him to be Mr. Miller. Exactly what it was right now I don't recall.

Q Now, at some time you located these papers that are in the transcript here of the preliminary hearing that come from a diary. When did you locate those? Before you questioned Mr. Miller or after or when?

A After.

Q And was it after you had found these rent receipts and all in the name of Hill?

A Yes.

Q And physically in the apartment where were they located? Where were they found?

A In a bedroom dresser drawer and I might add the right-hand side, because the left—

THE COURT: When you say "they" are you referring to the two pages of the diary or the diary or the rent receipts?

THE WITNESS: All of it. It was all in one drawer. All papers, all types of correspondence were in this particular drawer.

THE COURT: What specific charge did you arrest Miller on?

THE WITNESS: Robbery.

Q BY MR. HERZBRUN: You arrested him on the name of Hill at that time?

[fol. 19] A Well, we placed him under arrest and determined who he was later.

Q At any time did you ask him whether you might search the apartment? Any conversation along that line?

A No, sir. Immediately after the arrest he was pushed aside and we made a fast search of the apartment to determine there was no one else hiding.

Q But from there on, when you made a more detailed search for identification and the like, at that time did you ask him for permission to do so?

A No, sir.

Q And did he say anything to you asking that you not make a search?

A No, he did not.

Q Then I take it you transported him to the station from there, is that right?

A Yes, sir.

Q How long were you in the apartment altogether, more or less?

A Probably a couple of hours.

Q In that time did anyone come to the apartment?

A Numerous people came to the apartment.

Q Anybody identifying themselves as living there?

A No.

MR. HERZBRUN: Thank you. No further questions.

[fol. 20] CROSS EXAMINATION

BY MR. BERGER:

Q Officer, for what puriod of time did you accumulate this information pertaining to Mr. Hill? How long did it take you to accumulate this information? You said you had a card, you had a conversation with someone, an investigation—over what period of time did you accumulate this information?

A Probably a matter of six or seven hours.

Q Did you have a search warrant when you went to the house of Mr. Hill?

A No, sir.

Q Did you have a warrant for the arrest of Mr. Hill?

A No, sir.

Q Did you have a warrant either to search the premises or to search Mr. Hill?

A No, sir.

Q This man, this Mr. Miller you arrested, you said he looked like Mr. Hill, is that correct?

A Well, description-wise, yes.

Q He was about 6-1 or 6-2, wasn't he?

A As I recall he was 6-foot even.

Q How tall is Mr. Hill?

A Supposedly he's 5-10.

Q Did this Mr. Miller weight more or less than Mr. [fol. 21] Hill? Was he somewhat heavier?

A As I recall his weight was about 10 pounds heavier, yes.

Q Was he darker or lighter complected?

A I don't recall.

Q Did he have darker or lighter hair?

A I think his hair was brown. It may have been a little lighter.

Q Now, at the time you ascertained that Mr. Miller was Mr. Miller, you hadn't searched the apartment and found the diary, had you?

A I had, or had not?

Q Had not. You ascertained he was Mr. Miller, then you searched and found the diary, isn't that correct?

A Yes. However, it may have been simultaneous.

Q Didn't you on direct examination say that you ascertained the man was Mr. Miller, then at a later time you found the diary?

A Made a detailed search after that, yes.

Q And there was nothing at all—strike that.

Mr. Miller at no time represented that it was his apartment, did he?

A No, he did not.

Q And you at that time had it from your information and your belief that, and from the investigation which you had formerly pursued, that this was Mr. Hill's [fol. 22] apartment, isn't that correct?

A With Mr. Bader.

Q Well, this man didn't look like Mr. Bader, did he?

A I knew where Mr. Bader was, Counsel.

Q Well, this man didn't look like Mr. Bader, did he? You knew he wasn't Mr. Bader, didn't you?

A Yes.

Q You didn't release Mr. Miller did you?
A No, I did not.
Q You kept Mr. Miller in custody, did you not?
A Yes, sir.
Q And Mr. Miller was not allegedly at that time involved in any of the robberies which you were investigating in relation to Mr. Hill, was he?
A Is part of your question what I found out later? Two days later? Or what I knew at the time?
Q Strike that. At the time that you arrested Mr. Miller you weren't investigating a Mr. Miller or you didn't have any knowledge of a Mr. Miller regarding this robbery which Mr. Hill was allegedly involved in, were you?
A I could have been, yes.
Q Were you? Don't tell me what you could have been. Were you?
A As far as I knew at the time I was.
Q Oh, Mr. Miller was involved in the robbery at [fol. 23] the liquor store?
A As far as I knew he was.
Q What do you mean as far as you knew?
A Because he matched the description on those robberies as far as Mr. Hill and his companions.
Q Then you are saying that any male Caucasian about the height of 5-11 with brown hair living in the Valley area would be a suspect, is that what you are saying, Officer?
MR. HERZBRUN: Objection. Argumentative.
THE COURT: Sustained.
Q BY MR. BERGER: Had Mr. Miller's name ever come up in the investigation of the robbery of this liquor store which you were investigating?
A Prior to my going to the apartment?
Q Yes.
A No.
Q By the way, Sergeant Ide was with you when you went into the apartment, was he not?
A Yes, sir.
MR. BERGER: I have nothing further.

REDIRECT EXAMINATION

BY MR. HERZBRUN:

Q Just one question if I may. Defense counsel has indicated in his words what time you ascertained that [fol. 24] the man you arrested was Miller. Miller I take it had identified himself as Miller but you didn't ascertain that he was Miller until after you had taken him to the station, is that correct?

A I thoroughly checked it out and was aware of it approximately a day and a half later.

MR. HERZBRUN: Thank you. No further questions.

RECROSS EXAMINATION

BY MR. BERGER:

Q You said that you had a conversation with Mr. Miller and he identified himself as Mr. Miller, is that correct?

A He did.

Q Did you ask him for further identification?

A Yes, sir.

Q Did he show you further identification?

A He produced identification in the name of Miller.

Q What kind of identification did he produce?

A I don't recall.

Q Was it a driver's license?

A It could have been.

Q And it could have been a draft card too, couldn't it have been?

A It could have been.

Q So to the best of your knowledge at that time this [fol. 25] was Mr. Miller, is that not true?

A No. It was a man purporting to be Mr. Miller.

Q With identification of Mr. Miller?

A Yes.

Q Did his description fit the description he had on his identification?

A I don't recall.

Q Did you check it?

A Later I checked it.

Q How was he booked? As Mr. Hill or Mr. Miller?

A He was booked as Mr. Miller.

Q How was he arrested, as—strike that.

After you had ascertained that was Mr. Miller, did you ask this Mr. Miller for permission to search the apartment?

A No.

Q And the reason you didn't ask him for permission to search the apartment was because you knew he couldn't give you permission to search the apartment, isn't that true?

A I knew nothing of the sort at the time.

Q You knew he wasn't living there?

A No, I didn't.

Q You didn't see any of his clothes there?

A I didn't know who he was then.

Q He had showed you identification with the name [fol. 26] of Miller on it?

A He certainly did. And it didn't prove anything to me.

MR. BERGER: I have nothing further.

MR. HERZBRUN: Nothing further.

THE COURT: You may step down. Do you have any further testimony?

MR. HERZBRUN: No, your Honor.

MR. BERGER: No, your Honor.

MR. HERZBRUN: May the witness be excused?

THE COURT: Yes, the witness may be excused.

* * * *

[fol. 30] THE COURT: I was going to make an observation and maybe it won't be necessary.

The whole question here is one which I have not seen raised in any other case, nor has research in connection generally with this problem revealed it. Now, I believe the officer's testimony. I think he gave us honest answers, that he didn't give any answers when he didn't have any—he said he didn't recall—and the Court noted that there was certainly a minimum reference to any past recorded recollection by the witness officer to refresh his memory. The description of the defendant Hill, as is [fol. 31] usually the case in all these matters of identification by lay people, was quite general.

There isn't a great deal of difference in ten pounds—it all depends on where it is. The difference between 5-foot-10 and 6-foot-1 inch is not readily ascertainable. It's within an area of judgment which the very nature of the judgment itself predicates some leeway.

Now the sole question here is—and I think we can take judicial notice of the fact—that those who are apprehended and are arrested many times attempt to avoid arrest by giving false identification. Now here we do not know the nature of the identification which was given, but apparently the officer at least did not indicate that it was spurious in character; it was the kind of identification which was ordinarily used. But being a police officer he has had lots of experience and in his own mind—and I am not saying justifiably—he may have formed the conclusion that a false identification had in fact been made.

Now the only thing that bothers me then—and I make these statements to raise the issue—the issue is simply where there is affirmative evidence that the apartment belongs to a known individual—in this case there is no question but that the apartment was identified as Mr. Hill's, and this fact was corroborated from the mail box and by questioning residents in the area; granted that they were children, but I think sufficient investigation to [fol. 32] put the officer on notice that at least the person who had dominion of the apartment was a man by the name of Hill.

Query, if under those circumstances if the good faith which I am now assuming existed, for the purpose of raising the point, in the officer's mind that the identification given by Miller was not true, does this justify a total and complete search as was made? Now, with the suspicion that this might be a phony identification, and that the arrest was made of this person who identified himself as Miller, I think would have justified the search that was made to be certain that the apartment was empty and that there were no other persons in the apartment in whom the officer had a legitimate interest. But here we go prowling around in drawers and other receptacles.

* * * *

[fol. 37]

LOS ANGELES, CALIFORNIA, THURSDAY, OCTOBER 20, 1966, 9:00 A.M.

THE COURT: Hill. No. 6 on the trial calendar.

This matter was taken under submission for the purpose of giving counsel an opportunity to argue the effect of mistaken identity on the admissibility of certain written statements.

Do counsel desire to argue the matter any further?

MR. HERZBRUN: No, your Honor.

We submit it.

MR. BERGER: We submit the matter, your Honor.

THE COURT: All right. The Court had prepared a transcript of the proceedings of the testimony taken the last time. I have fully reviewed the evidence. I have determined that the officer in good faith believed that the defendant, or that the person who was arrested—not the defendant in this case—was believed by the officer in good faith to be Mr. Hill, and that whether or not this document consisted of two pages of the private diary of Mr. Hill should be admitted depends on whether or not at the time of the arrest and the search of the premises, the officer acted in good faith.

Now in making this determination I am fully aware of the consequences to Mr. Hill and I am fully aware [fol. 38] of the fact that the ruling opens a Pandora's Box insofar as the rights of private citizens in their homes are concerned. But to me the evidence is clear that the officer in good faith believed the third party to be Mr. Hill; there were not sufficient discrepancies in the descriptions which would fit Hill or the third party to say that the officer's conclusion was unreasonable; the officer was not responsible for the booking procedures which would book the defendant under the name which he gave, the validity of which identification it appears quite clearly to the Court from the transcript did not impress the officer. For that reason the motion to suppress the diary pages will be denied.

* * * *

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 106

Present Hon. VERNON P. SPENCER, Judge

325651

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

ARCHIE WILLIAM HILL, JR.

MINUTES—October 20, 1966

Trial is resumed. Deputy District Attorney H. Herzbrun and the Defendant with counsel L. Berger, present. Defendant's motion to suppress "Diary Pages" is denied. All rest. Defendant is found "Guilty" as charged of all counts. Probation report is ordered. Probation and sentence is continued to November 16, 1966, 9:00 AM in Department 106. Defendant's motion for new trial is set for same date, same time. Transcript of proceedings of October 7, 1966, is delivered to District Attorney for safe keeping. Remanded.

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Department No. 106

Present Hon. VERNON P. SPENCER, Judge

Case No. 325651

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

ARCHIE WILLIAM HILL, JR.

APPEARANCES:

(Parties and Counsel checked if present.
Counsel shown opposite parties represented.)

EVELLE J. YOUNGER, District Attorney, by
J. C. GALLIANO, Deputy

E. J. HOVDEN, Public Defender, by
L. BERGER, Deputy

JUDGEMENT—November 16, 1966

Motion for new trial is denied. Each Count: Probation denied. Sentenced as indicated.

Whereas the said defendant having been duly found guilty in this court of the crime of ROBBERY (Sec. 211 PC), a felony, as charged in each of the counts 1 and 2 of the information and KIDNAPING FOR THE PURPOSE OF ROBBERY (Sec 209 PC), a felony, as charged in count 3 (no degree fixed) (no disposition having been made as to issue of being armed)

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law, on said counts.

Sentences as to counts 1, 2 and 9 are ordered to run CONCURRENTLY with each other.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

106 DEC 2 1966

325651

ARCHIE W. HILL, JR., Booking Number 396-004, November 22, 1966.

Case No. 900 654
900 661

Charge 211 PC
209 PC

PEOPLE OF STATE OF CALIF.

v.

ARCHIE W. HILL, JR.
396-004

NOTICE OF APPEAL—filed November 25, 1966

I'm not sure of which case number 900 654 or 900 661 but this appeal is for the one I was convicted of on the date of November 16, 1966 in Division 106.

/s/ Archie W. Hill, Jr.

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

S.C. No. 900 654 or 900 661

D.A. No. 396-004

THE PEOPLE OF THE STATE OF CALIF.

v.

ARCHIE W. HILL, JR., DEFENDANT

INFORMATION

ROBBERY (Sec. 211 PC) 2 cts.
(Sec. 209 PC) 1 ct.

NOTICE OF APPEAL

I'm not sure which of these two case numbers is the one needed for this notice. Which ever I was found guilty on, on the date of November 16th, 1966 in court 106 is the correct case number.

I solemnly declare under penalty of perjury that the facts stated herein are true. (CCP 2097)

/s/ Archie W. Hill, Jr.
Petitioner

IN THE
DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION 3

Cr. 13180

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

ARCHIE WILLIAM HILL, JR., DEFENDANT AND APPELLANT

OPINION—March 28, 1968.

Hearing Granted May 22, 1968.

The Superior Court of Los Angeles County, Vernon P. Spencer, J., found defendant guilty of robbery and of kidnapping for the purpose of robbery, and defendant appealed. The Court of Appeal, Ford, P. J., held that search without a warrant of defendant's apartment incidental to the arrest therein of another whom the police mistakenly believed to be defendant was improper, and the incriminating evidence seized by the police was inadmissible.

Judgment reversed.

Search without a warrant of defendant's apartment incidental to the arrest therein of another whom the police mistakenly believed to be defendant was improper, and the incriminating evidence seized by the police was inadmissible in subsequent prosecution of defendant for robbery and for kidnapping for the purpose of robbery. West's Ann.Pen.Code, §§ 209, 211.

Joseph Amato, Palos Verdes Estates, under appointment by the Court of Appeal, for appellant.

Thomas C. Lynch, Atty. Gen., Elizabeth Miller and Barry H. Lawrence, Deputy Attys. Gen., for respondent.

FORD, Presiding Justice.

The defendant has appealed from a judgment of conviction of the crimes of robbery (Pen.Code, § 211) and kidnaping for the purpose of robbery (Pen.Code, § 209). The eyewitnesses to the offenses were unable to identify him, the only substantial evidence of his participation being statements contained in two pages of a diary shown to be in his handwriting and stolen property and other objects found in the bedroom of his apartment. The question presented is whether the police obtained such evidence by means of an illegal search of the defendant's apartment in his absence. The search immediately followed the arrest in the apartment of a man named Miller, whom the police believed to be the defendant Hill.

On June 6, 1966, Officer Gastaldo and three other officers went to the defendant's apartment. Officer Gastaldo's purpose was to arrest the defendant, Archie Hill. He had neither a warrant for the arrest of Hill nor a search warrant. Officer Gastaldo had information as to Hill's address and his physical description. He had been informed that Hill and a man named Bader occupied the apartment; the officer knew where Mr. Bader then was.

Officer Gastaldo determined that apartment No. 4 was being occupied by Hill by checking the mail box, on which only Hill's name appeared. One of the other officers made inquiry of children in the area. Officer Gastaldo then knocked on the door at approximately 8:15 p.m. Part of the officer's testimony was: "The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and from Baum and Bader [subsequently charged with the offenses jointly with Hill], answered the door. * * * We placed him under arrest for robbery." The officers then searched the premises and found, among other things, numerous rent receipts and personal correspondence in the name of Hill.

Officer Gastaldo further testified that the man arrested said that his name was Miller, that he did not live in the apartment and that he had no knowledge of what was in the apartment. Another portion of Officer Gastaldo's testimony was: "First I questioned him as to his identity, so as to make sure he was not Mr. Hill; he told me his

name was Miller; that he didn't know where Archie Hill was; that Archie Hill did in fact own the apartment there, or lived in the apartment, and that he was just sitting around waiting for him; that to his knowledge there was no one else in the apartment but him." Miller did not say how he entered the apartment, but said that he just came in and was waiting for Hill. He produced some type of identification in the name of Miller. But, Officer Gastaldo testified, it did not "prove anything" to him. Approximately "a day and a half later" he ascertained the true identity of the arrested man.

The pages from the diary were found in a dresser drawer in the bedroom after the questioning of Miller and after the finding of the rent receipts in the name of Hill. The other objects were also found in the bedroom. Miller was not asked to give permission for the search. The officers were in the apartment "[p]robably a couple of hours."

The evidence sustained the conclusion that Officer Gastaldo believed that the man he placed under arrest was Hill. He subsequently found that he was mistaken. Assuming that the police had reasonable cause for the arrest of Miller and the search of his person,[1] the question presented for resolution is whether the ensuing plenary search of the apartment was lawful. In Harris v. United States, 331 U.S. 145, at page 151, 67 S.Ct. 1098, at page 1101, 91 L.Ed. 1399, the Supreme Court stated: "The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control." (See United States v. Rabinowitz, 339 U.S. 56, 63, 70 S.Ct. 430, 94 L.Ed. 653.)

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[1] In People v. Yet Ning Yee, 145 Cal App.2d 513, at pages 517-518, 302 P.2d 616, at page 619, the court stated: "In People v. Kitchens, supra, 46 Cal.2d 260, 263, 294 P.2d 17, there is an intimation that where an officer in good faith mistakes another person for one whom the officer has reasonable grounds to believe is guilty of a felony, and searches the other person, finding on him evidence of the commission of a felony, the search and the consequent arrest is legal." (See Collings, Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief (1962) 50 Cal.L.Rev. 421, 442.)

The difficulty in the present case is that, aside from inferences arising from the mere presence of Miller in the apartment and based upon the officer's mistaken belief that he was Hill, the record does not show that the apartment was under the immediate control of Miller. The constitutionally protected privacy at stake was that of Hill who was absent from his place of residence. While the doctrine of probable cause assures a balance between the rights of the individual and those of the government with respect to the matter of arrest, the constitutional protection against unreasonable searches, particularly of a person's home, would be less than complete if a plenary search could be justified as incident to an arrest of a person mistakenly believed by an officer to be in immediate charge of the premises. Such a case is not one where the right of privacy must reasonably yield to the right of search. While it is true that in the present case it appears that the officers acted in good faith, the warning of Beck v. State of Ohio, 379 U.S. 89, at page 97, 85 S.Ct. 223, at page 229, 13 L.Ed.2d 142, should be heeded: "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Without the illegally obtained pages of the defendant's diary and other objects noted hereinabove the evidence is insufficient to sustain the conviction. Therefore, the judgment cannot stand.

The judgment is reversed.

COBEY and MOSS, JJ., concur.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

Crim. 12275

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

ARCHIE WILLIAM HILL, JR., DEFENDANT AND APPELLANT

OPINION—filed November 13, 1968

On October 20, 1966, after trial without a jury, defendant was convicted of the crimes of robbery (Pen. Code, § 211) and kidnapping for the purpose of robbery (Pen. Code, § 209). He has appealed from the resulting judgment.

Four men robbed a residence in Studio City on June 4, 1966. The following day, Alfred Baum and Richard Bader were arrested for possession of narcotics. At the time of their arrest, they were driving in defendant's car, which contained stolen property from the Studio City robbery. Both men made full statements admitting the commission of the robbery, and both implicated defendant.[1] Bader stated that he was sharing an apartment with defendant at 9311 Sepulveda Boulevard, and that the guns used and the property taken were there.

On June 6, Officer Gastaldo interviewed Baum and Bader, and they repeated their inculpations of Hill.[2] From

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[1] Baum and Bader were properly warned of their *Dorado* rights, but they were not also informed that counsel would be appointed if they were indigent. Their confessions were therefore inadmissible as to their guilt. (Miranda v. Arizona, 384 U.S. 436; see C.T. 47-58.) Because the confessions did not violate defendant's rights, however, they were admissible on the issue of probable cause for his arrest. (People v. Varnum, 66 Cal.2d 808, 813.)

[2] Bader told Gastaldo that he could go to the apartment to search. Even if failure to properly advise Bader of his *Miranda* rights did not vitiate the consent (see People v. Smith, 63 Cal.2d 779, 798-799), the subsequent search could not be justified on the basis of the consent because the facts surrounding it—whether it was not a mere submission to authority, not bound up with unlawful conduct—were never developed (see People v. Henry, 65 Cal.2d 842, 846), and

records of the Los Angele[s Police Department Gastaldo
verified Hill's association w[ith Bader, his age and physical
description, his residence, a[nd the make of his automobile.
This information correspor[ded with and corroborated the
descriptions provided by [the robbery victims and data
supplied by Baum and Ba[der. Gastaldo and three other
officers proceeded to Hill's [apartment, and after confirm-
ing the correctness of the [address, knocked on the door.
Gastaldo testified: "The d[oor was opened and a person
who fit the description ex[actly of Archie Hill, as I had
received it from both the ca[rds and from Baum and Bader,
answered the door. . . . W[e placed him under arrest for
robbery."

The arrested man said th[at his name was Miller, that he
did not live in the apartm[ent, and that he was just "sit-
ting around" waiting for [Hill. He stated that he did not
know of any stolen propert[y in the apartment, and that he
had seen no guns, although [an automatic pistol and a clip
of ammunition were in p[lain view. The man produced
identification, but Miller's [credentials did not "prove any-
thing" to Gastaldo. Miller [was subsequently booked, held
for a day and a half, and [released.

The officers searched th[e premises and found weapons,
stolen property, and two p[ages of a diary in defendant's
handwriting. The diary t[old a damning story of the rob-
bery of June 4.[3] At trial, [eyewitnesses to the robbery were

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Bader's consent does not preclu[de a challenge to the admissibility of
the evidence found in the ap[artment (see Witkin, Cal. Evidence,
§76, pp. 72-73).

[3] The diary narrated: "Fr[iday I went out with Gina. Then
Saturday night we went out t[o hold up a market, but when we got
there it was closed, so we had [to go to a house. We knocked on the
door, and when they answered [the door we ran in and I had to hit
the man on the head with my [gun, because he didn't get down on
the floor fast enough. We onl[y got about $60 from them. We left
from there and went to TJ [and scored seven keys. On the way
back we pulled over at the r[oadblock, but they only checked the
trunk of the car. We got back [home about 6:00 in the morning. I
went to bed. Then Dick and [one of the guys that made this run
with us left my apartment with [Dick to go and get something to eat.
This turned out to be a mi[stake, because they got busted for
possession of grass."

unable to identify Hill. The only substantial evidence of his guilt consisted of materials found in the search. The question presented is whether the police obtained such evidence by means of an unreasonable search and seizure.

It is axiomatic that a search incident to a valid arrest may "extend beyond the person of the one arrested to include the premises under his immediate control." (Harris v. United States, 331 U.S. 145, 151; People v. Cruz, 61 Cal.2d 861, 865-866; People v. Burke, 61 Cal.2d 575, 579-580; 44 Cal.Jur.2d, Searches and Seizures, § 42, pp. 110-113.) The police did not have probable cause to arrest a man named Miller, and Miller was not in fact in immediate control of Hill's apartment. The arrest and search must be validated, if at all, on the theory that the mistaken beliefs of the police rendered their activity "reasonable" in a constitutional sense.

THE ARREST

The threshold question whether the police had probable cause to arrest *Hill* need not be labored; they clearly did. Hill's participation in the robbery was attested by his cohorts, and although they were not informants of proven reliability, their admissions were entitled to great weight and were corroborated in material particulars. (People v. Sandoval, 65 Cal.2d 303, 307-311; People v. Ingle, 53 Cal.2d 407, 412-413.) Furthermore, the evidence shows that Gastaldo honestly and reasonably believed that the man he placed under arrest *was* Hill. Authority is sparse, but it appears that the arrest of Miller, whom the police reasonably believed to be Hill, was valid.

Thus, in People v. Campos, 184 Cal.App.2d 489, the police were searching for a Willie Campos who resided on Paramont Boulevard and was sought on federal charges. They had a picture of defendant, a different Willie Campos, who also resided on Paramount Boulevard. When collared by the police, defendant consented to a search which disclosed narcotics. Both arrest and search were valid. Similarly, in People v. Miller, 193 Cal.App.2d 838, the police sought a Cecil Miller who was wanted on three traffic warrants. They found defendant, a different Cecil

Miller, and a search incident to his arrest disclosed narcotics. The arrest and search were lawful.

Miller was not prosecuted, but the lesser included principle is plain; When the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest. (See People v. Kitchens, 46 Cal.2d 260, 263 (arrest was unlawful "unless the officers were justified in arresting Germane and reasonably mistook defendant for him."); People v. Yet Ning Yee, 145 Cal. App.2d 513, 517-518; cf. People v. Villareal, 262 A.C.A. 442, 448; People v. Soto, 144 Cal.App.2d 294, 300; 5 Cal. Jur.2d, Arrest, § 36, pp. 239-240).[4]

THE SEARCH

Unlike most mistaken arrest cases, however, this is not one in which the arrestee's *own* "papers, and effects" were at stake when the police initiated their search. There remains the question whether Hill's absence and Miller's lack of control of the premises combined to render a valid arrest insufficient warrant for the ensuing search; whether, in brief, the special concern for *privacy* implicit in the Fourth Amendment should override the ostensible reasonableness of the police action. In a chain of cases presenting analogous questions concerning vicarious waivers of constitutional rights, the answer has been no.

In People v. Gorg, 45 Cal.2d 776, 783, the defendant rented a room in a private residence. In defendant's absence, the homeowner allowed the police to search the room where they found narcotics. The court held that

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[4] The principle that mistaken identity does not vitiate an arrest may fairly be found in Penal Code section 836, subdivision 3, which also provides that mistake as to the commission of a felony does not vitiate an arrest. The statute allows an officer to arrest without a warrant whenever "he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

A search incident to an arrest on mistaken identity is valid (People v. Miller, *supra*, 193 Cal.App.2d 838; People v. Campos, *supra*, 184 Cal.App.2d 489), as is a search incident to an arrest for a felony which has not in fact been committed (cf. Witkin, Cal. Evidence (2d ed. 1966) § 113, pp. 112-113).

where "officers have acted in good faith with the consent and at the request of a home owner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority." Although sometimes criticized,[5] the rule that a search is not unreasonable if made with the consent of a third party whom the police reasonably and in good faith believe has authority to consent to their search has been regularly reaffirmed. (See, e.g., People v. Smith, *supra*, 63 Cal.2d 779, 799; People v. Caritativo, 46 Cal.2d 68, 72-73; People v. Corrao, 201 Cal.App.2d 848, 852; People v. Yancy, 196 Cal.App.2d 665, 667; People v. Williams, 189 Cal.App.2d 29, 38; People v. Ransome, 180 Cal.App.2d 140, 145-146; Witkin, Cal. Evidence (2d ed. 1966) §§ 82-88, pp. 78-82.)

These cases contain the two unusual elements found here: An absent defendant and license to search provided

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[5] See, e.g., Note (1966) 33 U.Chi.L.Rev. 797, 801-804; Note (1965) 12 U.C.L.A.L.Rev. 614.

The critics rely on Stoner v. California, 376 U.S. 483, 488, where the court said: "Nor is there any substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search [of defendant's hotel room]. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" (See Chapman v. United States, 365 U.S. 610 (landlord).) California cases are to the same effect. (See People v. Roberts, 47 Cal.2d 374, 377 (apartment manager); People v. Burke, 208 Cal.App.2d 149, 160 (hotel manager).)

And it is often ignored that the court also said: "[T]here is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room." (376 U.S. at p. 489.) The *sine qua non* of the operation of the rule of *Gorg* is an honest belief based on reasonable grounds.

Neither is Beck v. Ohio, 379 U.S. 89, 97, germane. The court remarked there that "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." In *Beck*, the police acted without probable cause and only debateably in good faith in arresting and searching the petitioner. No one disputes that good faith is not a substitute for probable cause.

by a person without actual authority to do so. They recognize that any search or arrest constitutes a substantial invasion of privacy. They conclude that such invasions are not more obnoxious when predicated upon a mistake. It therefore appears that neither Hill's absence nor Miller's lack of control vitiated the search where the police validly arrested Miller in the reasonable and good faith belief that he was Hill and that he controlled the premises.

In summary, we hold that the reasonable but mistaken beliefs of the police did not render their conduct unreasonable in a constitutional sense. Mistake of identity does not negate probable cause to arrest, and a search based on a valid but mistaken arrest is not unreasonable as an unwarranted invasion of either the arrestee's or the defendant's privacy. The evidence of Archie Hill's participation in the Studio City robbery which was the fruit of the search of his apartment was properly admitted. The judgment of conviction is affirmed.

PETERS, J.

WE CONCUR:

TRAYNOR, C.J.
MCCOMB, J.
TOBRINER, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.

ORDER DENYING REHEARING

December 13, 1968
ORDER DUE

Crim. No. 12275

Received Mar. 7, 1969, Office of the Clerk, Supreme Court, U.S.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

PEOPLE

v.

HILL

Filed Dec. 11, 1968, William L. Sullivan, Clerk
By /s/ J. L. Rogers, S. F. Deputy.

Appellant's petition for rehearing DENIED.

/s/ Traynor
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1968

ARCHIE WILLIAM HILL, JR., PETITIONER

vs.

CALIFORNIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 13, 1969

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 13, 1969.

/s/ Wm. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 13th day of February, 1969.

SUPREME COURT OF THE UNITED STATES

No. 69 Misc., October Term, 1969

ARCHIE WILLIAM HILL, JR., PETITIONER

v.

CALIFORNIA

On petition for writ of Certiorari to the Supreme Court of the State of California.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 13, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 730 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 389242 319

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~730~~ 51

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 730

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the California Court of Appeal, Second Appellate District is published in 67 Cal.Rptr. 389. The opinion of the California Supreme Court is reported in 72 Cal.Rptr. 641.

Jurisdiction

The California Court of Appeal, Second District, reversed the conviction of the appellant by their opinion of March 28, 1968. The California Supreme Court granted a hearing on May 22, 1968, and on November 13, 1968, af-

firmed the conviction of the appellant. The jurisdiction of this Court is invoked under 28 U.S. Code Section 1257(3) on the ground that a right guaranteed to the petitioner by the United States Constitution has been infringed by the judgment of the lower Court. The Petition for Certiorari was filed March 7, 1969 and Certiorari was granted October 13, 1969.

Constitutional Provisions Involved

Amendment Four to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment provides, among other things, that no person, "shall be compelled in any criminal case to be a witness against himself."

U.S.C.A. Constitution, Amendments 1 to 5, p. 102

Questions Presented

1. Does the Fourth Amendment state a general principle which requires antecedent justification before a magistrate of every search or seizure of person or property, subject only to judicially-created exceptions of necessity?

2. Is the rule in *Chimel* v. *California* limiting the police power to search a private residence retroactive?

Summary of the Facts

On October 20, 1966, after trial without a jury, the appellant and petitioner was convicted of the crimes of robbery (California Penal Code Section 211) and kidnapping for the purpose of robbery (California Penal Code Section 209).

Four men robbed a residence in Studio City on 4 June 1966. The following day, Alfred Baum and Richard Bader were arrested for possession of narcotics. At the time of their arrest, they were driving in the appellant's car, which contained stolen property from the Studio City robbery. Both men made full statements admitting the commission of the robbery, and both implicated the appellant. Baum and Bader were properly warned of their Dorado rights, but they were not also informed that counsel would be appointed if they were indigent. Their confessions were, therefore, inadmissible as to their guilt. (*Miranda* v. *Arizona,* 384 U.S. 436.) Because the confessions did not violate the appellant's rights, they were admissible on the issue of probable cause for his arrest. (*People* v. *Varnum,* 66 Cal.2d 808, 813.) Bader stated that he was sharing an apartment with the appellant at 9311 Sepulveda Boulevard, and that the guns used and the property taken were there.

On June 6, Officer Gastaldo interviewed Baum and Bader, and they repeated their inculpations of the appellant. From records of the Los Angeles Police Department, Gastaldo verified the appellant's association with Bader, his age and physical description, his residence, and the make of his automobile. This information corresponded with and corroborated the descriptions provided by the

robbery victims and data supplied by Baum and Bader. Gastaldo and three other officers proceeded to the appellant's apartment, and after confirming the correctness of the address, knocked on the door. Gastaldo testified: "The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and Baum and Bader, answered the door. . . . We placed him under arrest for robbery."

The arrested man said that his name was Miller, that he did not live in the apartment, and that he was just "sitting around" waiting for the appellant. He stated that he did not know of any stolen property in the apartment, and that he had seen no guns, although an automatic pistol and a clip of ammunition were in plain view. The man produced identification, but Miller's credentials did not "prove anything" to Gastaldo. Miller was subsequently booked, held for a day and a half, and released.

The officers searched the premises and found weapons, stolen property, and two pages of a diary in defendant's handwriting. The diary told a damning story of the robbery of June 4. At trial, eyewitnesses to the robbery were unable to identify the appellant.

Statement of the Facts

On June 4, 1966, at approximately 10:20 P.M., four men, two of whom were wearing masks (all four men were armed, two with guns and two holding knives), knocked lightly on the front door of a residence located at 11935 Laurel Hills in Studio City. (A-10)

Nicholas Georgiade was home with his wife and Mother that evening, and opened the door. One of the four men

told Georgiade that this was a stick-up; Georgiade replied, "You guys must be kidding around." Shortly thereafter, Georgiade was struck on the head with a gun. Georgiade could not identify the petitioner as one of the four men. (A-11)

Four or five dollars was given to one of the four men on demand. Georgiade did not give anyone permission to take his Toshiba radio. (A-12)

Mrs. Georgiade was met at her bedroom door by two men and became frightened and fell back into the bedroom. One of the men advised her to lay down on the floor and to keep quiet. (A-16)

One of the men took Mrs. Georgiade's purse containing her wallet, forty dollars, and card-case. (A-17) Mrs. Georgiade was also unable to identify the petitioner. (A-21)

Mrs. Bertha Georgiade, the mother of Nicholas Georgiade, upon demand, gave one of the men ten dollars. Mrs. Georgiade was also unable to identify the petitioner. (A-27)

Officer Gastaldo was the arresting officer of Baca, one of the defendants in this case. Gastaldo, during the course of the investigations of the robbery by the four men, was informed that an arrest for narcotics had been made and property taken from the residence robbery was recovered. (A-36)

The additional testimony set forth here was limited to probable cause. The car that was driven by Baum and Bader, two co-defendants, belonged to the petitioner. Prior to going to Hill's residence, the officer checked the local field interrogation files and found shake cards which associated Hill and Baum and Bader. (A-38)

On June 6, 1966, at approximately 10:30 P.M. and accompanied by three other officers, they then proceeded to Hill's apartment with the belief that there was additional property from the robbery at Hill's apartment. The officers knocked on the door and a man by the name of Miller opened the door. Immediately, one of the officers recognized that Miller closely fit the description of a suspect. (A-39)

At the same time the officer observed an automatic revolver with a loaded clip, sitting on the coffee table in the front room of the apartment. Sergeant Ide had informed Miller he was under arrest for robbery. One of the officers went into the bedroom and recovered the Starter gun, camera, two knives and the hoods. (A-40)

The officer located two pages of Hill's diary in the drawer of Hill's bedroom. The diary implicated Hill as being a participant in the robbery and was read into evidence over the objections of Hill.

The officers did not have a warrant for the arrest of Hill or for any other occupant at that apartment nor did they have a search warrant. Two of the four officers were armed with shotguns and all were dressed in plain clothes. (A-43) The officers were not given permission to search. (A-46)

The preliminary transcript was submitted to the Court and additional testimony was then offered by the People. Officer Gastaldo testified at the trial, stating he had the following descriptions of the robbers, "It consisted of four male Caucasians in age group from 21 to 26, all ranging in heights from 5'9" to 5'11", the hair on two of them was dark brown in color, the other two were wearing hoods,

had a complete description of the weapons, had a description of a vehicle, which was used, a late model Chevrolet, light in color, '65." (A-53)

Hill was described as a male Caucasian, either 19 or 20, 5'10", 155, brown hair and brown eyes. (A-54) Prior to going into Hill's apartment, Officer Gastaldo checked and found that one of the articles removed from Baum and Bader's card on their arrest under the marijuana charge was actually a piece of property which was taken in the robbery of the residence in Studio City. The officer checked with Baum, Bader, and the victim himself. (A-56)

The officer received a full statement as to what occurred at the various robberies and who was involved. Officer Gastaldo was given the address of Hill again and advised that the guns used in the robbery were there and also that the remaining property should be in his apartment. (A-56)

Officer Gastaldo then modified his earlier testimony at the preliminary hearing by stating, "The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and from Baum and Bader, answered the door." (A-57)

The apartment consisted of a living room, kitchen area, one bedroom and a bath. Miller told the officers his name was Miller and that he didn't live there and that he had no knowledge of what was in the apartment. Miller further stated that he didn't know where Hill was, that Hill lived in the apartment and that he was just sitting around waiting for him; that to his knowledge, there was no one else in the apartment but him. (A-59)

Miller showed the officers some type of identification which showed him to be Miller. Exactly what identification the officer couldn't recall. (A-60)

Immediately after the arrest, Miller was pushed aside and the officers made a fast search of the apartment to determine there was nobody hiding. The officers never asked Miller permission to search the apartment. (A-61)

The diary pages with the incriminating information was found in the bedroom drawer after the officers found rent receipts in the name of Hill.

It took the officers approximately six or seven hours to accumulate all the information regarding Hill's involvement before the officers went to Hill's apartment. (A-61)

Miller was six feet tall, or two inches taller than Hill; also Miller was ten pounds heavier than Hill. (A-62)

The officer was shown further identification by Miller. The officer couldn't recall if it was a driver's license and/or a draft card. The officer couldn't recall if Miller's description fit the description he had on his identification. (A-64)

Miller was booked in the name of Miller. (A-65)

Summary of Argument

The Fourth Amendment, construed in the light of judicial history, was intended to require use of a search warrant as a condition to searching a man's home with very few limited strict exceptions.

The petitioner had a personal diary seized by the police in his bedroom drawer when he was not present in his residence. There is a strong inference that the police search

was not conducted in good faith, based on the "mistaken" arrest of a visitor in Hill's apartment.

As an additional basis for reversal, the petitioner contends that the rule set forth in *Chimel* should be given retroactive effect.

For those reasons, the search and the judgment founded thereupon is inconsistent with the Fourth Amendment and should be disapproved.

ARGUMENT

The Petitioner Contends That the Damning Pages of His Diary, Which Resulted in His Conviction, Were Illegally Obtained in Violation of His Constitutional Rights Under the Fourth Amendment of the United States Constitution.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Without the illegally obtained diary pages, the evidence was clearly insufficient to find the petitioner guilty of any crime and, therefore, the conviction of the appellant based upon this incriminating evidence, is extremely prejudicial and should be reversed.

The Fourth Amendment to the United States Constitution, construed in the light of judicial history, with a few exceptions, was intended to require the use of a search warrant issued by a magistrate as a condition to searching a person's home.

Those very few exceptions negating the requirements of the police to first obtain a search warrant before searching a person's home, have been limited by this Court to situations where the officers have antecedently justified their right to arrest and have had additional information which would have justified issuance of a search warrant and which were conditioned upon the police conducting the search reasonably and in good faith.

In this case, there were no exigent circumstances and the only antecedent justification the police had at best, was for the arrest of the petitioner and sufficient information to obtain a search warrant for those items connected with the crime; in particular, the stolen goods and any weapons or evidence used to carry out the crime. However, there was absolutely no justification for the police seizure of the petitioner's personal diary located in the petitioner's bedroom drawer. Especially, when it is taken into account, the police's "mistaken" arrest took place in the petitioner's living room area.

It is the petitioner's strong contention that the search and seizure of the diary that occurred in this case was unconstitutional even prior to this Court's decision in *Chimel* v. *California,* 395 U.S. 752.

The cases of *Harris* v. *United States,* 331 U.S. 145 and *United States* v. *Rabinowitz,* 339 U.S. 56, which the California Supreme Court has interpreted as giving the police

almost unlimited rights to search incident to a lawful arrest are clearly distinguishable from the instant case.

As the majority opinion in *Rabinowitz* stated, "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches, and regrettably, in our discipline, we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. *Go-Bart Improv-* the facts and circumstances of each case. *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 357."

The Court further stated in the *Rabinowitz* opinion that, "Reasonableness is in the first instance for the District Court to determine. We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) The search and seizure were incident to a valid arrest; (2) The place of the search was a business room to which the public, including the officer was invited; (3) The room was small and under the immediate and complete control of respondent; (4) The search did not extend beyond the room used for unlawful purposes; and, (5) The possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money."

The very first factor that the Court in *Rabinowitz* relied on in determining that the search and seizure in that case was reasonable was that the search and seizure were incident to a "valid" arrest; here even that issue raises some question.

The trial court in this case ruled that the good faith of the four officers in arresting Miller (who was a visitor in

the petitioner's apartment, at a time when the petitioner was not at home), was a sufficient enough arrest to allow the police to conduct a complete search of the apartment incident to the mistaken arrest.

The California Court of Appeal reversed the trial court's decision and relied on *Harris* and *Rabinowitz* to do so. The California Court of Appeal, without any dissent stated, "Aside from inferences arising from the mere presence of Miller in the apartment and based upon the officer's mistaken belief that he was Hill, the record does not show that the apartment was under the immediate control of Miller. The constitutionally protected privacy at stake was that of Hill who was absent from his place of residence. While the doctrine of probable cause assures a balance between the rights of the individual and those of the government with respect to the matter of arrest, the constitutional protection against unreasonable searches, particularly of a person's home, would be less than complete if a plenary search could be justified as incident to an arrest of a person mistakenly believed by an officer to be in immediate charge of the premises. Such a case is not one where the right of privacy must reasonably yield to the right of search."

The California Court of Appeal in reversing Hill's conviction was very cognizant of the fact that separate personal interests are involved between an arrest and a subsequent search; the fact that you give up one, based on reasonable cause, does not mean necessarily that you have given up the other.

As Mr. Justice Frankfurter, quoting Judge Learned Hand, stated in the dissent in *Rabinowitz,* "It is true that

when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the right of privacy. The history of the two privileges is altogether different; the Fourth Amendment distinguishes between them; and in statutes they have always been treated as depending upon separate conditions." 176 F.2d 732.

The California Supreme Court by its opinion affirming the conviction of Hill, uses the logic that the mistaken arrest, since it was made in good faith, authorizes the officers to make a complete and thorough search of Hill's private residence even though he was absent.

The petitioner strongly contends these additional exceptions to the Fourth Amendment expressed by the California Supreme Court, would have diluted the protections afforded by this Amendment to the breakdown point. This is a far cry from what the Court stated in *Robertson* v. *Baldwin,* 165 U.S. 275, "the right to search incident to arrest, is merely one of those very narrow exceptions to the guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case."

Certainly the Court in *People* v. *Chimel, supra,* have put the search incident to a lawful arrest back to the perspective that the majority of past high Court decisions have espoused; that is, to protect private citizens from having their homes searched by the police absent a search warrant with just a few strict exceptions predicated on necessity.

The good faith of the four officers is highly debatable in this case. Mr. Miller at no time represented that it was his apartment, Miller even stating he was waiting for Hill; Miller was never asked permission to search the residence by the officers, which is a normal police practice prior to a search of a home, even when the search is incident to a lawful arrest, Miller told the officers he was Miller and showed the officers identification showing that he, in fact, was Miller; Miller is at least two inches taller than Hill and ten pounds heavier, and Miller was arrested and booked under the name of Miller.

It does not seem reasonable that a private person's residence which is normally protected by the Fourth Amendment against search and seizure is left wide open to officers because of their mistaken subjective good faith. Contrary to what the California Supreme Court stated in their opinion that *Beck* v. *Ohio,* 379 U.S. 89, 97, is not germane, the petitioner contends the manner in which the California Court of Appeal used this notation is extremely relevant for the general proposition it espouses, that is, "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police."

An analogy can easily be drawn between *Chimel* and the case at bar. In *Chimel,* the Court, while not necessarily agreeing that the strategy of maneuvering the arrest of Chimel in his home was utilized, agreed this possibility exists, since this as a practical matter would give law enforcement officials the opportunity to engage in searches not justified by probable cause. The officers knew in this case that if they didn't make an arrest, then they couldn't search the petitioner's residence.

By arresting Miller, the officers then felt they had a license to completely search the petitioner's residence in his absence. As the Court stated very appropriately in *Boyd* v. *United States,* 116 U.S. 616, "Illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon."

As this Court stated subsequently in *McDonald* v. *United States,* 335 U.S. 451, "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

"The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a

search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

These are some of the background cases that illustrate the importance of the Fourth Amendment. Beside the questionable arrest of the "petitioner" in this case, there are other substantial deviations from the main factors the majority opinion relied on in *Rabinowitz*. In the instant case the place searched was a private residence and the police were not given any permission to search; in *Rabinowitz*, the place that was searched was a business room that was open to the public and the officers. Also in *Rabinowitz* the room that was searched was small and under the immediate and complete control of the respondent. In the instant case, as detailed earlier by the Court of Appeal in California, Miller did not have apparent control of the premises as evidenced by the record, nor did he have actual control. And unlike *Rabinowitz*, in this case there was no crime being perpetrated at the time the officers made the arrest of Miller.

To belabor the vast factual differences between *Rabinowitz* and the case at bar would seem to argue the obvious. Certainly the majority opinion in *Rabinowitz* left many practical questions as to the limits the police could search. As the dissenting opinion stated, "Is search to be restricted to the room in which the person is arrested but not to another open room into which it leads? Or, take a house or an apartment consisting largely of one big room serving as dining room, living room and bedroom. May search be made in a small room but not in such a large room? If you may search the bedroom part of a large room, why not a bedroom separated from the dining room by a par-

tition? These are not silly hard cases. They put the principle to a test.

"To assume that this exception of a search incidental to arrest permits a free-handed search without warrant, is to subvert the purpose of the Fourth Amendment by making the exception displace the principle. History and the policy which it represents alike admonish against it."

Rabinowitz, out of all of this, has come to stand for the proposition that a warrantless search incident to a lawful arrest may generally extend to the area that is considered to be in the immediate possession or under the control of the person arrested.

When the totality of facts in the instant case are closely examined, it appears extremely difficult to justify the police search and seizure of the petitioner's diary. The police did not have a search warrant when apparently there was ample time to obtain same; the police made the search on the basis of a mistaken arrest while the petitioner was absent; the diary was in a bedroom drawer while the arrest took place in the living room; and the seized diary was not connected with the crime but merely acted as evidentiary matter which the Court in the past has treated in a far more strict manner insofar as deviating from the Fourth Amendment is concerned.

In *Trupiano* v. *United States*, 334 U.S. 699, the Court emphasized the importance of securing and using search warrant wherever reasonably practicable. The Court stated, "This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. To provide the nec-

essary security against unreasonable intrusions upon the private life of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement."

While *Rabinowitz* over-ruled *Trupiano* later with respect to placing less emphasis on securing a search warrant and more with the reasonableness of the search, this Court in subsequent decisions has not ignored as an important factor the facts in each case regarding the amount of time and other circumstances to determine if the police had the opportunity to secure a search warrant. *Terry* v. *Ohio*, 392 U.S. 1.

Harris v. *United States, supra,* brought up some very important points that help distinguish that case from the one at bar. As the Court observed in *Harris,* the petitioner was in exclusive possession of a four-room apartment. The canceled checks and other instrumentalities of the crimes charged in the warrants would not likely be visibly accessible. In addition, the objects sought for and those actually discovered were properly subject to seizure.

The Court in *Harris* stated, "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.

"Certainly this is not a case of search for or seizure of an individual's private papers. In keeping the draft cards in his custody, petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search."

In the instant case, we have the police seizing the petitioner's private diary; this diary was not involved in any way regarding the criminal activity charged against the petitioner. If the Fourth Amendment didn't protect the police seizure of something as personal as this at the time in question, then one would honestly wonder what the Fourth Amendment prior to *Chimel* did protect.

Even the *Harris* case didn't give the police unlimited search and seizure power. As the Court stated in *Harris,* "Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive."

The search and seizure of the petitioner's diary in this case would be a clear example of this. The police were searching the petitioner's apartment for knives, guns, hoods, and a camera, those things used to commit the crime and the stolen articles themselves. The seizure of the diary was completely unrelated to the crime, and certainly to maintain a diary is hardly a crime as the draft cards that were seized in *Harris* was.

Additionally, in *Harris,* the police were searching for two canceled checks of an oil company which had been stolen and which were thought to have been used in effecting the forgery. The search for canceled checks neces-

sarily requires a more extensive search, possibly extending into Harris's personal papers. The same need to rummage into personal papers is clearly absent when the object of a search is for such items as knives, and cameras.

The District Attorney was in a real dilemma in this case. This is especially made clear when the District Attorney is attempting to justify the search and seizure of the petitioner's diary to the Court based on the mistaken arrest. On page 33 of the trial transcript the District Attorney, Mr. Herzbrun, states, "They are looking for more. Remember this man has created a problem. They have asked him, 'Who are you?'

" 'I'm Miller and I've got some identification.' Now they have got to determine. . . . they're pretty sure, in fact, they are very sure they have Hill. . . . they are really arresting Hill at that point. . . . "

The problem is readily apparent; if the District Attorney argues that the police proceeded to search and seize the personal papers of the petitioner, including the diary, rent receipts, etc. for the purpose of making sure Miller wasn't Hill, then you weaken the officer's story that he in good faith, was sure he was arresting Hill and not Miller, thereby negating any right of the officers to search at all.

If, on the other hand, the officers are sure that Miller was the petitioner, then there is absolutely no justification for searching and seizing the diary and other personal papers that were completely unconnected with the crime.

The present case would almost certainly be reversed by the majority's thinking in *Harris* on the basis that the petitioner's diary was obtained as a result of an illegal search and seizure in violation of the protections afforded by the Fourth Amendment.

As Justice Frankfurter in the dissenting opinion stated, in quoting Justice Brandeis, "The makers of our Constitution conferred, as against the Government, the right to be left alone, the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

Although the petitioner did not object to the damning evidence of the diary on the basis of the Fifth Amendment, a brief mention might appropriately be made here on this subsidiary issue. The Fifth Amendment, among other things, declares that no person, "shall be compelled in any criminal case, to be a witness against himself." The statements made by the petitioner in his diary involving himself were extremely incriminating and, in fact, were the basis of his conviction.

As the Court declared in *Boyd* v. *United States, supra,* "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other."

The Court in *Gould* v. *United States, supra,* expressed their views towards this issue by stating, "The same papers being involved, the answer to this question must be in the affirmative, for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be in effect, as ruled in the Boyd case, to compel the defendant to become a witness against himself."

Part of the *Gould* decision certainly stands for the proposition that even in a lawful search with a search warrant, the police cannot use this authority to gain access to a private citizen's residence and search and seize private papers solely for the purpose of securing additional evidence to be used against him in a criminal or penal proceeding, "but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."

The rule of *Mapp* v. *Ohio*, 367 U.S. 643, that exclusion of evidence seized in violation of search and seizure provisions of the Fourth Amendment is required of States by the due process clause of the Fourteenth Amendment, and, therefore, the petitioner respectfully submits that the petitioner's personal diary should not have been admitted into evidence over the objections of the petitioner.

Does the Rule in Chimel v. State of California Apply to Unconstitutional Searches and Seizures Prior to the Date of the Opinion of Chimel?

Inasmuch as the unlawful search and seizure in the instant case took place prior to June 23, 1969 (the date the opinion in *Chimel* was handed down), it is important from a constitutional stand-point to have a Court determination as to whether or not *Chimel* will be treated retroactively or prospectively.

As previously stated in the first issue, the petitioner strongly contends that the diary pages were seized by the police as a result of an unconstitutional search and seizure in violation of his Fourth Amendment rights. The *Chimel* case clearly limiting the power of the police to search, merely emphasizes the unconstitutional seizure in this case and if *Chimel* is given retroactive application, then clearly this would be additional basis to reverse the conviction of the petitioner for the reasons already stated in the discussion of the first issue.

The instant case is another in a whole series of cases dealing with the problem the Courts have had in making a determination of the effective date of criminal decisions relating to constitutional rights. For many years the United States Supreme Court had held that its decisions in this field were retroactive. *Gideon* v. *Wainwright,* 372 U.S. 335, *Hamilton* v. *State of Alabama,* 368 U.S. 52, and, *Douglas* v. *State of California,* 372 U.S. 353.

The California Supreme Court in the *Lopez* case, 62 Cal.2d 368, and the United States Supreme Court in *Linkletter* v. *Walker,* 381 U.S. 610, ruled its decisions were partially prospective by holding that they applied only to pending appeals. Then this Court approached pure prospective operation when it held in *Johnson* v. *State of New Jersey,* 384 U.S. 719, that the rules announced the week before, *Miranda* v. *State of Arizona,* 384 U.S. 436, should apply only to cases tried after the date *Miranda* was decided, although the constitutional evasion took place before *Miranda* was decided.

In the *Johnson* case, the Supreme Court also announced that its rulings in *Escobedo* v. *State of Illinois,* 378 U.S.

478 were prospective in that they applied only to cases tried after *Escobedo* was decided. Then in the *Stovall* case, 388 U.S. 293, the Court held that line-up rules announced in the *Wade* and *Gilbert* cases were to be applied prospectively in that the application of these rules would apply only to cases where the line-up was held after June 12, 1967.

It is the petitioner's contention that the constitutional issues involved in the instant case are more closely aligned to the constitutional guarantees expressed in *Gideon* and should be given retroactive effect.

The Court in *Stovall* declared in effect, that many factors are involved in helping the Court to determine whether a constitutional change in interpretation is to be given retroactive treatment factors such as: (1) The criteria guiding resolution of question of retroactivity of constitutional rule of criminal procedure indicate the purpose to be served by new standards; (2) The extent of reliance by law enforcement authorities on old standards, and (3) The effects on administration of justice of retroactive application of new standards.

Retroactivity or non-retroactivity of rules is not automatically determined by provision of Constitution on which dicta are based, and each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which such factors combine must inevitably vary with the dicta involved. See *Stovall, supra.*

The Fourth Amendment guarantee against unreasonable searches and seizures does not fall in the category of the new rules espoused in *Wade* and *Gilbert*. Subsequently,

Stovall failed to apply to cases on a retroactive basis. The law enforcement authorities across the country were, or should always have been, aware of the protection afforded private citizens in their homes and should have known if they didn't obtain a search warrant in advance, or if they made an unreasonable search incident to a lawful arrest, that there was a great possibility that the evidence obtained in violation of the victim's constitutional rights would be excluded from evidence.

Law enforcement authorities knew how strongly this Court in most instances in the past has interpreted the protections afforded by the Fourth Amendment. The law enforcement authorities also knew when they took great liberties in searching a private citizen's home without prior approval from a magistrate that they were skating on thin ice. The Court's ruling in *Chimel* is no sudden and surprise departure from earlier Court decisions. Many authorities knew the steady encroachments of the protections guaranteed by this Amendment would eventually come to a halt.

Stovall is easily distinguished from the instant case. In *Stovall* the Court relied heavily on the fact that law enforcement authorities of the Federal Government across the country had, prior thereto, proceeded on the premise that the Constitution did not require the presence of counsel at pre-trial confrontations for identification. Furthermore the overwhelming majority of American Courts have always treated the evidence questions as a question of credibility and not one of admissibility.

So in *Stovall* you have a brand new requirement that the law enforcement authorities didn't know was required

or expected. As a result, to treat this new requirement with retroactive effect would have had a serious disruption in the whole judicial process. Many cases would have been overturned on this basis, even though at the time of the line-up, a lawyer was not at the time known to be constitutionally required.

The *Wade* and *Gilbert* rules in effect were aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence; the Court in *Stovall,* quoting the Court in *Johnson* v. *State of New Jersey,* 384 U.S. at 729, stated, "The question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree."

This Court, if it so chose to do, could have reasoned there was only a "matter of degree involved in the defense of Gideon from properly having a lawyer represent him; but this, the Court wisely refrained from so doing." It is the petitioner's contention that such a distinction as contained in *Gideon* is present between the *Wade* and *Gilbert* rules and the issues involved in the case at bar.

The Court in *Linkletter* v. *Walker,* 381 U.S. 622, in determining whether a decision should be retrospectively applied stated they must weigh the merits and demerits of the particular case by looking to prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation, and "this approach is particularly correct with reference to Fourth Amendment prohibitions as to unreasonable searches and seizures."

To give *Chimel* retroactive effect would probably cause very little disruption in the judicial processes across the country nor would it be inconsistent with past high Court decisions to go back years to determine if the defendant's constitutional rights have been violated. When dealing with important constitutional questions, the Court has, on many occasions in the past, ruled out other problems that may occur if they give a rule retroactive effect. Problems caused in large part because of the age of the case such as unavailable witnesses and other relevant evidentiary matter that may be difficult to produce at the re-trial.

In *Fay* v. *Noia,* 372 U.S. 391, Noia was convicted by unconstitutional means twenty-one years before his conviction reached the United States Supreme Court and twenty years elapsed before *Reck* v. *Pate,* 367 U.S. 433, was overturned by this Court.

The Court in *Noia* stated that habeas corpus was designed to go behind final judgments and release people who were held on convictions obtained by reason of a denial of constitutional rights.

As Justice Black stated in the dissent in *Stovall* v. *Denno,* 388 U.S. 300, "To deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetrates a rank discrimination against them.

In the instant case this would, as Justice Black states in the dissenting opinion of *Linkletter* v. *Walker, supra,* "merely open up to collateral review cases of men who were in prison due to convictions where their constitutional rights had been disregarded. Noia rested on the sound principle that people in jail, without regard to when they

were put there, who were convicted by the use of unconstitutional evidence were entitled in a Government dedicated to justice and fairness to be allowed to have a new trial with the safeguards the Constitution provides."

To rule that *Chimel, supra,* is not retroactive is to cut off many defendants who are now in jail from any hope of relief from unconstitutional convictions and denies these same defendants due process and equal protections of the laws that are set forth in the Fourteenth Amendment of the United States Constitution.

For the reasons heretofore stated, the petitioner respectfully requests that the conviction of the petitioner be reversed.

Respectfully submitted,

JOSEPH AMATO
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF ....., *ss.*:

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

.....

On 22 Nov., 1969, I served the within Petitioner's opening brief on the State of California in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palos Verdes addressed as follows:

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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on 22 Nov. 1969 at Palos Verdes, California.

MARILYN GASTON

IN THE

Supreme Court of the United States

October Term, 1969
No. ~~730~~ 51

ARCHIE WILLIAM HILL, JR.,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1969
No. 730

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF

Questions Presented

1. Was the mistaken arrest of one Miller lawful, where the authorities had probable cause to believe that petitioner Hill had committed a robbery and kidnaping, and further had probable cause to believe that Miller was petitioner Hill?

2. Was the search of petitioner's one-bedroom apartment, as an incident of what the authorities reasonably and in good faith believed to be the lawful arrest of petitioner, reasonable (a) under *United States v. Rabinowitz,* 339 U.S. 56, and *Harris v. United States,* 331 U.S. 145, (b) under *Chimel v. California,* 395 U.S. 752, which disapproved those decisions?

3. Should the rule promulgated in *Chimel v. California,* 395 U.S. 752, to the extent that it announces a departure from previous holdings of this Court, be ap-

plied prospectively only and not to cases in which searches were properly conducted under then-existing law?

Statement of the Proceedings

A. History of the Case

In an information filed by the District Attorney of Los Angeles County, petitioner, together with Alfred Elmo Baum and Richard Joseph Bader, was charged in Counts I and II with robbery, a felony, in violation of California Penal Code section 211. It was further alleged in the information that the three defendants were armed with deadly weapons at the time of the commission of the two robberies. In Count III of the information, petitioner, together with Baum and Bader, was charged with kidnaping for the purpose of robbery, a felony, in violation of California Penal Code section 209. (R. 1-2.)

Petitioner's motion to dismiss the information pursuant to California Penal Code section 995 was denied as to all counts. Petitioner was arraigned and pleaded not guilty to each count. (R. 3.) Petitioner, personally, and all counsel waived trial by jury. (R. 4.)

By stipulation of counsel the cause was submitted on the testimony contained in the transcript of the preliminary hearing, which transcript was received in evidence as an exhibit by reference (R. 8-50), subject to the trial court's rulings, with each side reserving the right to offer additional evidence. It was further stipulated by counsel that all stipulations entered into at the preliminary hearing were deemed entered into at the trial, and that any exhibits received at the preliminary hearing were deemed received in evidence at the trial.

subject to the trial court's rulings. Petitioner personally stipulated to the foregoing procedure and expressly waived his right of confrontation. (R. 5-7.)

The prosecution presented additional testimony before the trial court, but the defense did not offer any evidence. (R. 51-65.) The trial court made certain findings and rulings and then continued the matter for further argument by counsel and review by the court. (R. 65-66.)

On October 20, 1966, the trial court denied petitioner's motion to suppress certain evidence and found petitioner guilty as charged on all counts. A probation report was ordered and the matter continued. (R. 67-68.)

On November 16, 1966, petitioner's motion for new trial was denied, as was his application for probation. The trial court made no disposition of the allegation in the information that petitioner was armed, and the court did not fix the degree of the two robberies.[1] As to each count, petitioner was sentenced to state prison for the term prescribed by law,[2] the sentences being ordered to run concurrently with each other. (R. 69.)

Petitioner filed timely notice of appeal from the judgment of conviction. (R. 70-71.) On appeal the California Court of Appeal, Second Appellate District, Division Three, reversed the judgment in an opinion filed

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[1]The failure of the trial court to determine the degree of these offenses rendered them robbery of the second degree. Cal. Pen. Code § 1157.

[2]California law provides that kidnaping for the purpose of robbery is punishable by imprisonment in state prison for life with possibility of parole where bodily harm is not suffered by the victim. Cal. Pen. Code §209. At the time of the commission of the charged offenses, robbery of the second degree was punishable by imprisonment in state prison for one year to life. Cal. Pen. Code §§ 213, 671.

March 28, 1968, and reported unofficially as *People v. Hill,* 260 A.C.A. 585 (1968) [67 Cal. Rptr. 389]. (R. 72-75.) Respondent's Petition for Hearing was granted by the California Supreme Court, which affirmed the judgment of conviction in an opinion filed November 13, 1968, and reported as *People v. Hill,* 69 Cal. 2d 550 (1968) [446 P.2d 521]. (R. 76-81.) Petitioner's Petition for Rehearing was denied by the California Supreme Court on December 11, 1968. *Supra.* (R. 82.)

On October 13, 1969, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and petition for writ of certiorari, transferring the case to the appellate docket and placing it on the summary calendar. (R. 84.) 90 S.Ct. 112; 24 L. Ed. 2d 68.

B. Factual Statement

On June 4, 1966, Nicholas Georgiade resided with his wife and his mother at 11935 Laurel Hills Road, Studio City, California. He and his mother were watching television at home that evening. At approximately 10:15 or 10:20 p.m., in response to a very light tapping sound on his front door, Mr. Georgiade turned on the porch light, opened the door, and was confronted by four men. Two wore masks, and two were unmasked. Two of the men were armed with guns and two with knives. (R. 10, 23.)

Apparently Mr. Georgiade was told that it was a "stick up." Believing that it might be a joke, he said, " 'You guys must be kidding around.' " He was told, " 'No. We are not fooling around,' " but replied, " 'What is this, some kind of a joke?' " Mr. Georgiade was then hit on the head with a gun. (R. 10-11.) The blow inflicted a laceration which ultimately necessitated

seven stitches. (R. 12.) Mr. Georgiade and his mother were told to lie on the floor. His head was bleeding a great deal. (R. 13, 24.)

Mr. Georgiade's wife heard the noise and conversation and came running out of her bedroom. She was met at her bedroom door by two men, one of whom was masked and was holding a knife over his shoulder. She was frightened, and said, " 'Please don't kill me.' " She was told by one of the men to lie down on the floor to avoid being hurt and was asked, " 'Where is your purse.' " She pointed it out to the man and was given permission to join her husband. (R. 16-17.) She was told to lie down next to him in the front room and was "scared to death." (R. 20, 24-25.)

Mr. Georgiade's mother asked for permission to place her dress on her son's head because of the bleeding. Her hands became "full of blood," and she asked one of the men to get a towel, which he did. (R. 24.)

The following items were taken from Mr. Georgiade: four or five dollars, two cameras, a camera case containing lenses, a flash attachment, and flashbulbs, and a Toshiba radio. (R. 12, 21.) Forty dollars was taken from the purse belonging to Mr. Georgiade's wife. (R. 17, 20.) She later provided Sergeant Albert Gastaldo of the Los Angeles Police Department Robbery Detail with the serial number of one of the two cameras. (R. 20, 36.)

One of the men demanded money from Mr. Georgiade's mother, and she told him that she had ten dollars in her white purse. The man could not find the money inside the purse and demanded that she find it, telling her, " 'Get out and walk slow.' " She walked twenty

or twenty-five feet from the front room to the bedroom and found the ten dollars in a zippered portion of the purse. The man took it and told her, " 'O.K. Go back and lay down.' " (R. 24-26.) She was "shaking all over" and returned to where her son was lying. (R. 25-26.)

One of the men stated, " 'We have got to find more money or we won't leave the house. We should find more money.' " The men searched in all the rooms for more money and then left. (R. 26.)

At approximately 10:30 that evening, Scott Lee Armstrong, a fifteen-year-old boy who lived in the next block, and a friend of his were leaning against a 1965 or 1966 Chevolet Impala. He saw four men run out of Mr. Georgiade's driveway, which was twenty-five feet from the vehicle. One of the men had a gun. Scott began to walk toward the rear of the automobile in order to record the license number, when two of the men began to push him, pointed a gun at him, hit him in the chest with a fist, and ordered him to run down the driveway. When the men left, Scott telephoned the police. (R. 30-35.)

Sergeant Gastaldo, in the company of three other officers, conducted a search of petitioner's apartment two days later, shortly after 8:15 p.m. on June 6, 1966. (R. 56-57.) The sergeant, an officer of eleven years' experience on the police force, gave the following reasons for conducting the search. (R. 52-53.)

Several things led him to believe that petitioner was involved in several robberies in the San Fernando Valley area of Los Angeles, and in particular in the Nicholas Georgiade robbery in Studio City. The following information, apparently furnished to him by the victims

and Scott Armstrong, described the suspects in the Georgiade robbery:

> "It consisted of four male Caucasians in age group from 21 to 26, all ranging in heights from 5-foot-9 to 5-foot-11; the hair on two of them was dark brown in color, the other two were wearing hoods, had a complete description of the weapons, had a description of a vehicle which was seen as the getaway car. . . . Late model Chevrolet, light in color, '65." (R. 53.)

The officer checked out field interrogation cards on file with the police department "which associated [petitioner] Mr. Hill with Mr. Baum and Bader." (R. 38.) The cards indicated "1911 Sepulveda Boulevard, apartment number four, as belonging to Mr. Hill." (R. 38-39, 54.) The cards gave petitioner's birthdate, his business address, and the "circumstances for which the card was made." The cards also described petitioner as "a male Caucasian, either 19 or 20, 5 feet 10 inches, 155, brown [eyes] and brown [hair]." One of the cards described an automobile owned by petitioner as a two-door black 1957 Buick with California license number PZV001, and Sergeant Gastaldo checked further and found that this vehicle had been impounded "in connection with a previous arrest." (R. 44, 54-55.)

A fellow officer, Sergeant Ide of the robbery detail, informed Sergeant Gastaldo that there had been several robberies in the Van Nuys Division in which "the physical descriptions . . . were almost identical" with the Georgiade robbery. He also told Sergeant Gastaldo that he had received some unconfirmed information that petitioner and some other individuals had guns in their possession prior to the commission of the Georgiade

robbery. Sergeant Gastaldo was also informed by Sergeant Ide that Richard Joseph Bader and Alfred Elmo Baum were in custody at the Van Nuys Division on a narcotics charge and that the vehicle which they were driving at the time of their arrest on June 6, 1966 (two days after the Georgiade robbery) was checked and turned out to be the 1957 Buick belonging to petitioner. (R. 36-37, 55.)

Sergeant Ide told Sergeant Gastaldo that some property was removed from petitioner's vehicle at the time of Bader's and Baum's arrest. After checking police records and consulting Mr. Georgiade, Sergeant Gastaldo ascertained that one of the articles removed from petitioner's vehicle was the radio which had been taken from Mr. Georgiade during the course of the robbery. (R. 55-56.)

At 5:30 p.m. on the date Bader and Baum were arrested, Sergeant Gastaldo had a conversation with them after advising them of their constitutional rights.[3] (R. 37, 56.)

From both Bader and Baum, Sergeant Gastaldo:

> ". . . received a full statement as to what occurred at various robberies and who was implicated in them, and that [Sergeant Gastaldo] could go to Mr. Hill's [petitioner's] apartment—they gave [Sergeant Gastaldo] the address again, informed [him] that the guns used in the robbery were there and also that the remaining property should be in [petitioner's] apartment."

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[3]Bader, and presumably Baum, were advised that they had a right to counsel (but not that they had a right to a public defender), that anything they said could be used against them in a criminal proceeding, and that they did not have to talk to the officer unless they wanted to. (R. 37, 56.) *See People v. Hill*, 69 Cal. 2d 550, 551(n. 1) (1969) [446 P.2d 521, 522]. (R. 76.)

Bader and Baum gave an address for petitioner on Sepulveda, and Bader also informed Sergeant Gastaldo "that he [Bader] was sharing that apartment with Mr. Hill [petitioner]." (R. 56.)

At approximately 8:15 p.m. that same day, Sergeant Gastaldo, in civilian attire and in the company of Sergeant Ide and two other sergeants, proceeded to the address given by Bader. The foregoing information known to Sergeant Gastaldo, with the exception of what he had learned from the eyewitnesses, was acquired by him within the preceding six or seven-hour period. The officers verified that Archie Hill (petitioner) lived in Apartment 4, by checking the mailbox for that apartment, on which only petitioner's name appeared, and by making inquiry of a child in the area of the apartment house. The officers then knocked on the door of the apartment. (R. 56-58, 61.) Their guns were not drawn. (R. 43.)

The door was opened by a person "who fit the description exactly of [petitioner] Archie Hill, as [Sergeant Gastaldo] had received it from both the cards and from Baum and Bader." (R. 39, 57.) Sergeant Gastaldo had not previously seen petitioner but "immediately . . . recognized that [the person] closely fit the description of several robberies which we were investigating with this group."[4] (R. 39, 57.)

Prior to arresting the person the officers observed from outside the apartment an automatic firearm lying on a coffee table in plain sight in the front room (the

[4]The only definite disparity between the appearance of petitioner and the person arrested, as reflected by the record, was that petitioner was two inches shorter (5'10" rather than 6'0") and ten pounds lighter. (R. 62.)

living room), with a fully loaded clip lying next to it. (R. 40, 45-46, 59.)

The officers identified themselves. Sergeant Gastaldo could not recall whether the person invited them in. The officers immediately placed the person under arrest for robbery, believing that he was petitioner. They were not armed with an arrest warrant or a search warrant. (R. 43, 57-58.)

The officers then entered the apartment. No one other than the officers and the person under arrest was present inside the apartment, which consisted of a living room and one bedroom, in addition to a bathroom and a kitchen area. (R. 40, 58.)

The officers asked the person whether he was petitioner Hill in order to make sure of the fact. The person replied "that his name was Miller and that he didn't live there, and that he had no knowledge of what was in the apartment; he had never seen any guns; to his knowledge he knew nothing about them." The person was asked how he could not have any knowledge concerning the automatic lying in plain view; he replied, but Sergeant Gastaldo did not recall the response. The person stated "that he didn't know where Archie Hill was; that Archie Hill did in fact own the apartment there, or lived in the apartment, and that he was just sitting around waiting for him; that to his knowledge there was no one else in the apartment but him." The door to the apartment had a lock, but the person stated, in response to Sergeant Gastaldo's question, "that he just came in and was waiting for Mr. Hill." (R. 58-60.)

The person "produced some type of identification which showed him to be Mr. Miller." Sergeant Gas-

taldo did not recall "[e]xactly what it was." (R. 60.) However, the identification "didn't prove anything" to Sergeant Gastaldo. (R. 65.) The trial court took "judicial notice of the fact—that those who are apprehended and are arrested many times attempt to avoid arrest by giving false identification."[5] (R. 66.)

After speaking to the person, the officers searched the apartment incident to the arrest and without the permission of either petitioner or the arrestee. The following objects were seized by the officers: Numerous rent receipts and personal correspondence, in the name of (petitioner) Archie Hill and Dick Bader, were found in a bedroom dresser drawer. (R. 41, 58, 60.) Also found in the bedroom were a starter pistol, two eight-inch switchblade knives, a Fujica 35 automatic camera with a brown case and bearing a serial number, and two hoods bearing two holes and sewn from white T-shirts. (R. 9, 40, 58.) Under a sofa in the front room Sergeant Ide found a .22 caliber revolver. (R. 9, 40.)

Also found in the bedroom dresser drawer were two pages of a diary. (R. 40, 60.) The pages, which were received in evidence as Exhibit 7 (R. 7, 40, 49, 67), read as follows:

> ". . . 'Friday I went out with Gina. Then Saturday night we went out to hold up a market, but when we got there it was closed, so we had to go to a house. We knocked on the door, and when they answered the door we ran in and I had to hit the man

[5]California courts may take judicial notice of facts of common knowledge. Cal. Evid. Code § 452(g). A matter judicially noticed is to be considered by the trier of fact as an established evidentiary fact. Cal. Evid. Code § 457.

on the head with my gun, because he didn't get down on the floor fast enough. We only got about $60 from them. We left from there and went to TJ and scored seven keys. On the way back we pulled over at the roadblock, but they only checked the trunk of the car. We got back home about 6:00 in the morning. I went to bed. Then Dick and one of the guys that made this run with us left my apartment with Dick to go and get something to eat. This turned out to be a mistake, because they got busted for possession of grass.' " (R. 41.)

It was stipulated by the prosecution and defense counsel that the handwriting on the diary pages was made by the same person who filled out a certain Los Angeles Police Department exemplar card, and that the exemplar card was filled out by petitioner. (R. 47.)

The person arrested was brought to the police station and booked. (R. 61, 65.) Sergeant Gastaldo thoroughly checked out the question of the man's identity, and only a day and a half later did he become aware that the arrestee was in fact named Miller and was not petitioner. (R. 64.) Apparently Miller was then released, the police having no reason to detain him. (R. 63.) At 11 p.m. on the day following Miller's arrest, the fourth participant in the Georgiade robbery, one Baca, was arrested by Sergeant Gastaldo. (R. 36, 41-42.)

At the preliminary hearing Mr. Georgiade could not identify any of the four robbers positively but found Baum to be similar to one of the robbers who was not wearing a hood. (R. 11-12.) The robbers were at the Georgiade residence for twenty-five or thirty minutes

but after the first thirty seconds or minute of their presence, they prevented Mr. Georgiade from looking at their faces. (R. 15.)

Mr. Georgiade's wife positively identified Baum as one of the robbers and identified Bader as looking "very much like" one of the masked men on the basis of her observation of his eyes and nose, which were visible. (R. 18-19.) However, she could not identify the other two robbers. (R. 21.)

Mr. Georgiade's mother was unable to identify any of the robbers because she was too frightened to look directly at them. (R. 24, 27.) However, they appeared young to her, approximately twenty years of age. (R. 28.)

Scott Armstrong identified Bader and Baum as two of the four robbers who fled in the automobile which was parked outside the Georgiade residence. (R. 31-32.) They had come close to him when they hit him and told him to "get moving." (R. 35.) The moon was out, and it was an "extremely bright night." (R. 33.)

Mr. Georgiade was able to identify the .22 caliber revolver taken from underneath the sofa in petitioner's living room as the same type, model, color, and handle as the gun with which he was struck during the course of the robbery. (R. 11.) His wife, as well as Scott Armstrong, also identified the weapon as similar to one used on that occasion. (R. 18, 32.)

Mr. Georgiade and his wife identified the starter pistol found in petitioner's bedroom as the firearm carried by one of the other robbers. (R. 11, 19.)

Mr. Georgiade's wife identified the two switchblade knives and the two hoods found in petitioner's

apartment as similar to those used in the robbery. (R. 18-19, 22.)

Mr. Georgiade and his wife also identified the camera recovered from petitioner's apartment as the one taken from them during the robbery, and Mr. Georgiade identified the radio recovered from petitioner's automobile at the time of Bader's and Baum's arrest as the radio taken by the robbers. (R. 13, 20.)

No evidence was offered in defense either at the preliminary hearing or at the trial. (R. 65.)

Summary of Argument

The arresting officers clearly had probable cause to arrest petitioner and reasonably and in good faith believed that it was petitioner, rather than one Miller, whom in fact they were arresting at petitioner's apartment. The person who answered their knock "fit the description exactly" of petitioner. (R. 39, 57.) From the entrance to the apartment the officers observed an automatic firearm lying on a coffee table in plain sight with a fully loaded clip lying next to it. Nevertheless Miller denied having seen any guns in the apartment. (R. 40, 45-46, 58-59.) Miller, who was the only person present inside the apartment, denied being petitioner but indicated total ignorance of petitioner's whereabouts, stating that he was "just sitting around waiting for [petitioner]." Although the door to the apartment had a lock, Miller was unable to give any satisfactory explanation for his presence. (R. 58-60.) Not surprisingly, Miller's identification, bearing a name other than petitioner's, "didn't prove anything" to the arresting officers. The trial court took judicial notice, as it properly could under California law, of the com-

monly known fact "that those who are apprehended and are arrested many times attempt to avoid arrest by giving false identification." (R. 60, 65-66.) The officers' reasonable and good faith belief that they were arresting petitioner is borne out by the fact that Miller was not immediately released but instead was booked and released only after the matter of his identification had been checked out thoroughly for a day and a half. (R. 63-65.)

The arrest was lawful in light of the circumstances which confronted the officers. Probable cause is not a technical concept; it involves the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Brinegar v. United States, 338 U.S. 160, 175.

The objective of the search of petitioner's apartment incident to the mistaken arrest of Miller was reasonable—to seize the weapons and stolen property connected with the robbery for which the arrest was being made. The officers looked only in places where such items might be located. That they unexpectedly happened to come across a diary written by petitioner which inculpated him in the robbery did not preclude use of the diary in evidence. The manner of conducting the search was in all respects reasonable, and the scope of the search was unexceptional under pre-*Chimel* law.

This search was not rendered "unreasonable" in a constitutional sense by the fact that the arrestee, contrary to the reasonable belief of the arresting officers, exercised dominion and control over the one-bedroom apartment *in only a physicial and not a proprietary sense.*

Respondent submits that the California Supreme Court was correct in refusing to infuse into the Fourth Amendment's formulation of reasonableness the inapposite concepts of the law of property.

Desist v. United States, 394 U.S. 244, 248;
Warden v. Hayden, 387 U.S. 294, 304-06;
Jones v. United States, 362 U.S. 257, 266.

Respondent's inability after extensive research to find a single reported decision from any federal or state court passing on the precise question here involved is indicative of the fact that upholding the present search of petitioner's one-bedroom apartment incident to the valid but mistaken arrest of Miller is unlikely to open up a Pandora's box for that minority of law enforcement officers who are unscrupulous. This is particularly so in view of the severely restricted scope of search incident to arrest permissible now under *Chimel.* Moreover, the peculiar circumstances which gave rise to, and legitimatized, the present search are unlikely to recur with any frequency. "[W]e should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." *Harris v. United States,* 331 U.S. 145, 155. The officers' mistake in no way affected the apparent ability of Miller, who suspiciously denied knowledge of a loaded firearm which was visible in his immediate vicinity, to arm himself or dispose of evidence.

Even under *Chimel,* however, the present search was lawful, since that decision recognizes that there are exigent circumstances which may permit a search of broader scope than normally permitted in the absence of a search warrant. The arrest and search were made less

than 48 hours after the commission of the offense and apparently only a couple of hours after the officers acquired probable cause for the arrest, at which time it was after regular court hours. Petitioner and another member of the robbery gang, armed and dangerous men, were at large and could well be engaged in committing other assaults and robberies. Secondly, the officers could reasonably believe that the arrest of two members of the gang might alert petitioner to flee from his apartment and possibly from the jurisdiction. Finally, if petitioner were arrested that evening and the search delayed until the next day when a search warrant could be procured, the fourth member of the gang, perhaps alerted by petitioner's (and the other two men's) arrests and realizing that the arresting officers might have observed incriminating evidence while arresting petitioner, might remove the weapons, the disguises, and the stolen property from petitioner's apartment—particularly since the officers had information that all the weapons and all the remaining stolen property were kept at petitioner's apartment.

See Warden v. Hayden, 387 U.S. 294, 298-99.

In any event, the new rule announced in *Chimel,* invalidating procedures expressly sanctioned by several decisions of this Court, should be applied only to cases in which the search took place after the date of that decision.

Each of the fundamental criteria guiding resolution of the question whether a new rule of constitutional law affecting criminal procedure should be applied retroactively support limiting the application of the new rule announced in *Chimel* to cases in which the search took

place after the date of that decision, June 23, 1969: (1) the purpose to be served by the new standards, (2) the extent of reliance by law enforcement on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new rules.

Desist v. United States, 394 U.S. 244, 249.

The purpose of deterring improper searches by the police would not be served by applying the new rule retroactively to cases in which the search was conducted in reliance on then-existing law as defined by this Court's decisions. The new rule has no bearing on the issue of guilt or on the fairness of petitioner's trial. Finally, the necessity of retrying the multitude of pending cases in which convictions were obtained in reliance on the *Rabinowitz* and *Harris* decisions could well bring the machinery of justice to a halt in populous counties.

ARGUMENT

I

The Authorities Having Probable Cause to Arrest Petitioner, the Mistaken Arrest of a Person, Whom They Had Probable Cause to Believe Was Petitioner, Was Lawful

Petitioner's claim of error is based entirely on the admission in evidence, over his objection (R. 68), of certain weapons, implements of disguise, items of stolen property, and a diary connected with the robbery and kidnaping of which he was convicted. Petitioner contends that these items were obtained from his apartment as the result of a search and seizure conducted in purported violation of the Fourth and Fourteenth Amendments to the Constitution. Inasmuch as the officers who conducted the search had not procured a search warrant (R. 43), the validity of the search and seizure depends initially upon the legality of the arrest of one Miller at petitioner's apartment and secondly upon whether the ensuing search and seizure was a reasonable incident of that arrest.

The legality of Miller's arrest, which is not directly disputed by petitioner, was upheld by the trial court (R. 67), the California Court of Appeal (R. 74; *People v. Hill*, 260 A.C.A. 585 (1968) [67 Cal. Rptr. 389]), and the California Supreme Court (R. 78-79; *People v. Hill*, 69 Cal. 2d 550 (1968) [446 P.2d 521]).

In *Ker v. California*, 374 U.S. 23, eight members of this Court agreed that the decision in *Mapp v. Ohio*, 367 U.S. 643, rendering the exclusionary rule applicable in state criminal proceedings,

> ". . . established no assumption by this Court of supervisory authority over state courts [citation]

and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. . . . Mapp did not attempt the impossible task of laying down a 'fixed formula' for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures; it recognized that we would be 'met with "recurring questions of the reasonableness of searches" ' and that, 'at any rate, "[r]easonableness is in the first instance for the [trial court] . . . to determine," ' . . . thus indicating that the usual weight be given to findings of trial courts."

Ker v. California, 374 U.S. 23, 31-32.

". . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . . Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

Ker v. California, 374 U.S. 23, 34.

See also Sibron v. New York, 392 U.S. 40, 60-61.

Sergeant Gastaldo of the Los Angeles Police Department was one of the investigating officers in the Georgiade robbery. He was assigned to the Robbery

Detail and had eleven years' experience with the police force. (R. 36, 52.) During the six or seven hours preceding his participation in the arrest and search in question, he acquired the following information constituting probable cause to believe that *petitioner* was one of the armed men who had committed the robbery and kidnaping. (R. 52-53, 61.) (The officer did not obtain an arrest warrant. (R. 43.))

1. The radio taken from the Georgiade residence was found in an automobile belonging to petitioner. This occurred when two men, Baum and Bader, were arrested in the vehicle on a narcotics charge two days after the robbery. (R. 36-37, 55-56.)

2. Field interrogation cards on file with the police department associated petitioner with Baum and Bader. The cards indicated 1911 Sepulveda Boulevard, Apartment 4, as petitioner's address, and described petitioner as a male Caucasian nineteen or twenty years of age, 5'10" in height, 155 pounds in weight, with brown eyes and brown hair. (R. 38-39, 54.) This closely approximated the victims' description of the robbers as four male Caucasians, twenty-one to twenty-six years of age, ranging in height from 5'9" to 5'11", the two men who were not wearing hoods having brown hair. (R. 53.)

3. The field interrogation cards described an automobile owned by petitioner as a two-door black 1957 Buick with California license number PZV001. Sergeant Gastaldo's investigation disclosed that this vehicle, which was the one in which Baum and Bader were riding at the time of their arrest, had been impounded "in connection with a previous arrest." (R. 44, 54-55.)

4. A fellow officer in the robbery detail, Sergeant Ide, informed Sergeant Gastaldo that there had been

several robberies in a nearby area in which "the physical descriptions . . . were almost identical" with the Georgiade robbery. He also told Sergeant Gastaldo that he had received some unconfirmed information that petitioner and some other individuals had guns in their possession prior to the commission of the Georgiade robbery. (R. 55.)

5. Shortly after their arrest, and on the evening of the same day, Baum and Bader informed Sergeant Gastaldo as to "what occurred at various robberies and who was implicated in them," told the officer that he "could go" to petitioner's apartment on Sepulveda, and stated that "the guns used in the robbery" and "the remaining property" should be at petitioner's apartment. Bader informed Sergeant Gastaldo that he (Bader) was sharing the apartment with petitioner.[6] (R. 56.)

In addition to their relevance on the issue of probable cause, Bader's words arguably would be sufficient to justify this Court in upholding the validity of the search on the basis of Bader's consent. This is so despite the conclusion of the California Supreme Court to the contrary.[7] *See, e.g., Stroble v. California,* 343 U.S. 181,

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[6]The California Supreme Court held, "Baum and Bader were properly warned of their Dorado rights [*People v. Dorado,* 62 Cal. 2d 338 (1965) [398 P.2d 361], *cert. denied,* 381 U.S. 937], but they were not also informed that counsel would be appointed if they were indigent. Their confessions were therefore inadmissible as to their guilt. (Miranda v. Arizona, 384 U.S. 436; see C.T. 47-58.) Because the confessions did not violate *defendant's* rights, however, they were admissible *on the issue of probable cause for his arrest.* (People v. Varnum, 66 Cal. 2d 808, 813.)" (Emphasis added.) (R. 76; *People v. Hill,* 69 Cal. 2d 550, 551(n. 1) (1969) [446 P.2d 521, 522]).

[7]The California Supreme Court held, "Bader told Gastaldo that he could go to the apartment to search. Even if failure to properly advise Bader of his Miranda rights did not vitiate the consent (see People v. Smith, 63 Cal. 2d 779, 798-799), the

189-90. Bader was in fact a cotenant of the apartment (R. 58), having actual as well as apparent authority to consent to the search of the apartment, and there is nothing in the record to indicate that his consent was involuntary or in submission to authority or unlawful conduct. In the absence of a contemporary objection to the search by a cotenant, the circumstance of being in custody does not incapacitate a person from giving effective consent to the search of his residence.

Davis v. United States, 328 U.S. 582, 593-94;
United States v. Mitchell, 322 U.S. 65, 69-70;
People v. Smith, 63 Cal. 2d 779, 798-99 (1966) [409 P.2d 222, 235-36], *cert. denied,* 388 U.S. 913;
People v. Terry, 57 Cal. 2d 538, 558-59 (1962) [370 P.2d 985, 997], *cert. denied,* 375 U.S. 960.

6. Upon arriving at the address given by Bader, the officers verified that petitioner lived in Apartment 4 by checking the mailbox for that apartment, on which only petitioner's name appeared, and by making inquiry of a child in the area of the apartment house. (R. 56-57.)

Clearly then, the evidence constituting probable cause for *petitioner's* arrest met the tests of being within the arresting officer's knowledge or being based

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subsequent search could not be justified on the basis of the consent because the facts surrounding it—whether it was not a mere submission to authority, not bound up with unlawful conduct—were never developed (see People v. Henry, 65 Cal.2d 842, 846), and Bader's consent does not preclude a challenge to the admissibility of the evidence found in the apartment (see Witkin, Cal. Evidence, § 76, pp. 72-73)." (R. 76-77; *People v. Hill,* 69 Cal. 2d 550, 551(n.2) (1969) [446 P.2d 521, 522]).

upon reasonably trustworthy information, and being sufficient in itself to warrant a man of reasonable caution in the belief that petitioner had committed the offense of robbing the Georgiades.

Ker v. California, 374 U.S. 23, 34-35;
Brinegar v. United States, 338 U.S. 160, 175-76.

The question which must next be resolved is whether this information, in conjunction with the circumstances which follow, gave the officers probable cause to believe that the person who was in fact arrested, one Miller, was petitioner, this justifying the arrest incident to which petitioner's apartment was searched.

Respondent submits that the following facts, apparent to the arresting officers, gave them probable cause to believe that Miller was the man whom they had probable cause to arrest for the Georgiade robbery.

1. Upon knocking at the door of petitioner's apartment, the officers were confronted by a person (Miller) "who fit the description exactly of [petitioner] Archie Hill, as [Sergeant Gastaldo] had received it from both the cards and from Baum and Bader." (R. 39, 57.) Sergeant Gastaldo had not previously seen petitioner but "immediately . . . recognized that [the person] closely fit the description of several robberies which we were investigating with this group." (R. 39, 57.)

The only definite disparity between the appearance of Miller and petitioner, as reflected by the record, was that petitioner was two inches shorter (5'10" rather than 6'0") and ten pounds lighter. (R. 62.) Clearly these discrepancies were negligible and were not even necessarily apparent to the officers.

See Draper v. United States, 358 U.S. 307, 312-13;

People v. Sandoval, 65 Cal. 2d 303, 310 (1966) [419 P.2d 187, 191], *cert. denied,* 386 U.S. 948.

Cf. Rios v. United States, 364 U.S. 253, 255-56;

United States v. Di Re, 332 U.S. 581, 587, 592-95.

2. From outside the apartment the officers observed an automatic firearm lying on a coffee table in plain sight with a fully loaded clip lying next to it. (R. 40, 45-46, 59.) This corroborated the information which Sergeant Gastaldo had received earlier from Sergeant Ide and Baum and Bader, to the effect that petitioner was armed. (R. 55-56.)

3. Miller told the officers that he had never seen any guns in the apartment, despite the fact that the automatic was in plain view on the coffee table. (R. 58-59.) This suspicious conduct reinforced the officers' belief that the man was petitioner attempting to evade arrest and search.

4. Miller furthermore was the only person present inside the suspect apartment. *See Warden v. Hayden,* 387 U.S. 294, 298; *Stephens v. United States,* 271 F.2d 832, 834 (D.C. Cir. 1959). Although he denied being petitioner, he aroused further suspicion by indicating his total ignorance as to petitioner's whereabouts, stating that no one else was present and that he was "just sitting around waiting for [petitioner]." Although the door to the apartment had a lock, Miller apparently was unable to give any satisfactory explanation for his presence. (R. 58-60.)

5. Not surprisingly, Miller's identification, bearing a name other than petitioner's, "didn't prove anything" to Sergeant Gastaldo. (R. 60, 65.) The trial court took judicial notice, as it properly could under California law (Cal. Evid. Code §§ 452(g), 457), of the commonly known fact "that those who are apprehended and are arrested may times attempt to avoid arrest by giving false identification." (R. 66.)

From the foregoing, it is apparent that Sergeant Gastaldo entertained a reasonable and good faith belief that the person he was arresting was in fact petitioner. This is borne out by the fact that Miller was not released immediately following completion of the search, but instead was booked and then released only after Sergeant Gastaldo had thoroughly checked out Miller's identification for a day and a half. (R. 63-65.) As to the arrestee's being booked under the name Miller (R. 65), this reflects only what was noted by the trial court—"the officer was not responsible for the booking procedures which would book the defendant under the name which he gave." (R. 67.)

The reasonableness of Sergeant Gastaldo's belief that he was arresting petitioner must be judged in light of the circumstances which immediately confronted the officer as he opened the door, not in a vacuum of legal theory shaped by three and a half years' hindsight. "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Brinegar v. United States, 338 U.S. 160, 175.

In light of these principles, it is submitted that the California Supreme Court correctly concluded:

> "When the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." (R. 79.)
>
> *People v. Hill*, 69 Cal. 2d 550, 553 (1968) [446 P.2d 521, 523].

This principle, which is given implicit recognition in the provision in California Penal Code section 836 authorizing an arrest without a warrant whenever the officer "has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed," has been fashioned as a workable rule of state law consistent with the Fourth and Fourteenth Amendments' mandate of reasonableness.

II

The Search of a One-Bedroom Apartment Rented by Petitioner, Incident to the Arrest of Another Person Whom the Authorities Reasonably and in Good Faith Believed to Be Petitioner, Was Reasonable Under Pre-Chimel Law and Also Under Chimel

A. The Objectives and the Scope of the Search Made It Lawful Under Then-Existing Law

The search of petitioner's apartment, incident to the mistaken arrest of Miller at the apartment, immediately followed the arrest. The manner of conducting the search was reasonable, as was the objective of the search, which appears to have been to seize weapons, implements of disguise, and stolen property connected with the of-

fense for which the arrest was made. The record does not support petitioner's argument that the officers searched for evidence which would clarify whether Miller was in fact petitioner, and that therefore they did not in good faith believe that Miller was petitioner when they arrested Miller. The record does not indicate that the officers searched in any place where weapons or stolen property would not be located. That they unexpectedly uncovered the diary in the process of such a search did not preclude use of the diary in evidence.

Abel v. United States, 362 U.S. 217, 238.

A subsidiary point made by petitioner, which is improperly presented before this Court in view of the fact that the question was not raised or decided in any of the state courts and further was not specified as error in the Petition for Writ of Certiorari,[8] is that the diary pages were not subject to seizure and use in evidence because of their self-incriminatory nature as documents prepared by petitioner. However, it has long been settled that:

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized."
>
> *Gouled v. United States,* 255 U.S. 298, 309.
>
> *See also Abel v. United States,* 362 U.S. 217, 238-40.

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[8]*See Cardinale v. Louisiana,* 394 U.S. 437, 438; *Henry v. Mississippi,* 379 U.S. 443, 450; *Fay v. Noia,* 372 U.S. 391, 438-39; *Irvine v. California,* 347 U.S. 128, 129-30; Rule 40(1)(d)(2), Rules of the Supreme Court of the United States.

Since the rejection in *Warden v. Hayden,* 387 U.S. 294, 300-01, 307-08, of the "mere evidence" rule, documentary evidence does not appear to be accorded any greater protection against invasion of privacy than any other forms of evidence. *See also People v. Thayer,* 63 Cal. 2d 635 (1965) [408 P.2d 108], *cert. denied,* 384 U.S. 908.

Assuming a valid arrest, the only substantial question involved in judging the legality of the search is whether the scope of the search exceeded permissible bounds so as to render it unreasonable in the absence of a search warrant.

At the time of the search in question (June 6, 1966), as well as at the time the search was upheld by the California Supreme Court, the applicable law, as unequivocally established by this Court's decisions, was that "searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."

> *United States v. Rabinowitz,* 339 U.S. 56, 65-66. *See also Cooper v. California,* 386 U.S. 58, 62; *Harris v. United States,* 331 U.S. 145, 150-52.

Application of that rule authorized the warrantless search incident to arrest in *Rabinowitz, supra,* a one and a half hour search which encompassed the desk, safe, and file cabinets in a one-room office. *Supra* at 58-59. A much more intensive search, lasting five hours and encompassing the defendant's entire four-bedroom apartment, was upheld in *Harris. Supra* at 149, 152. *See also Abel v. United States,* 362 U.S. 217, 237.

The scope of the present search is unexceptional in the context of the law which, prior to the decision in

Chimel v. California, 395 U.S. 752, governed the admissibility in state proceedings of evidence which was obtained as a result of a search and seizure conducted by law enforcement officers. With the exception of the revolver discovered under the living room sofa, all of the seized items (consisting of weapons, hoods, the stolen camera, the diary, rent receipts and unspecified correspondence which was not used in evidence) were discovered inside a dresser drawer in the sole bedroom of the apartment. (R. 9, 40-41, 58, 60.) The manner in which the search of the apartment was conducted was no different in any respect from the manner in which it would have been conducted had the officers not been mistaken and the arrestee in fact been petitioner.

Was this search, which was of permissible objective and scope under then-existing law as an incident of a clearly valid arrest, rendered somehow "unreasonable" in a constitutional sense by the fact that the arrestee, contrary to the reasonable belief of the arresting officers, exercised dominion and control over the one-bedroom apartment *in only a physical and not a proprietary sense*?

This was precisely the position taken by the California Court of Appeal in reversing petitioner's conviction (R. 74-75; *People v. Hill,* 260 A.C.A. 585, 587-88 (1968) [67 Cal. Rptr. 389, 391]) and repudiated by the California Supreme Court in affirming petitioner's conviction. (R. 78-81; *People v. Hill,* 69 Cal. 2d 550, 553-55 (1968) [446 P.2d 521, 523-25].)

Respondent submits that the California Supreme Court was correct in refusing to infuse into the Fourth Amendment's formulation of reasonableness the inapposite concepts of the law of property. Only last Term

this Court, quoting from *Silverman v. United States,* 365 U.S. 505, 511, again "cautioned that the scope of the Fourth Amendment could not be ascertained by resort to the 'ancient niceties of tort or real property law.'" *Desist v. United States,* 394 U.S. 244, 248. And Justice Frankfurter, writing for the court in *Jones v. United States,* 362 U.S. 257, stated in the context of the problem of standing:

> ". . . . We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." *Supra* at 266.
>
> *See also Warden v. Hayden,* 387 U.S. 294, 304-06.

The court in *Stoner v. California,* 376 U.S. 483, in the context of the question of a consent to search, held that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by *unrealistic* doctrines of 'apparent authority'" (emphasis added), *supra* at 488, but at the same time implied that a reasonable basis for a conclusion of apparent authority could validate a search conducted in reliance thereon. *Supra* at 489.

The long-standing principle that the legality of searches depends upon their overall reasonableness rather than on any fixed criteria such as the doctrines of the law of property was reaffirmed in *Chimel*:

> "Thus, although '[t]he recurring questions of the reasonableness of searches' depend upon 'the facts and circumstances—the total atmosphere of the case' [quoting *Rabinowitz,* 339 U.S. at 63, 66] those facts and circumstances must be viewed in the light of established Fourth Amendment principles."
>
> *Chimel v. California,* 395 U.S. 752, 765.

It has always been an established Fourth Amendment principle that the lawfulness of the conduct of an arresting officer is judged by the probabilities facing him at the moment in question—"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States,* 338 U.S. 160, 175.

Of course, as the Court noted in *Beck v. Ohio,* 379 U.S. 89, 97, "subjective good faith alone [is not] the test" under the Fourth Amendment. The California Supreme Court distinguished *Beck,* where "the police acted without probable cause and only debatably in good faith in arresting and searching the petitioner;" upholding the present arrest and search, the Court added: "No one disputes that good faith is not a substitute for probable cause." (R. 80; *People v. Hill,* 69 Cal. 2d 550, 555 (n.5) (1968) [446 P.2d 521, 524].)

Respondent's inability after extensive research to find a single reported decision from any federal or state court passing on the precise question here involved is

indicative of the fact that upholding the present search of petitioner's one-bedroom apartment incident to the valid but mistaken arrest of Miller is unlikely to open up a Pandora's box for that minority of law enforcement officers who are unscrupulous. This is particularly so in view of the severely restricted scope of search incident to arrest permissible now under *Chimel v. California,* 395 U.S. 752. Moreover, the peculiar circumstances which gave rise to, and legitimatized, the present arrest and search are unlikely to recur with any frequency. "[W]e should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." *Harris v. United States,* 331 U.S. 145, 155. *See also Beauharnais v. Illinois,* 343 U.S. 250, 263. "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for." *Abel v. United States,* 362 U.S. 217, 238.

Since the arrest of Miller, whom the officers reasonably and in good faith believed to be petitioner and as such a resident of the one-bedroom apartment, was clearly valid, the officers had the right to conduct a search of permissible scope incident to the arrest. Their mistake in no way affected the apparent ability of Miller, who suspiciously denied knowledge of a loaded firearm which was visible from the entrance to the apartment (R. 45, 58-59), to arm himself or dispose of evidence.[9]

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[9]A contrary holding might mean that an apprehended suspect, in order to foil an arrest-based search, would have only to deny his identity and perhaps produce false identification. Unless the arresting officer personally knew the suspect, the of-

(This footnote is continued on the next page)

Respondent submits that the search of petitioner's apartment was reasonable under then-existing law.[10]

B. The Search Was Lawful Under Chimel, There Being No Opportunity to Obtain a Search Warrant Since the Arrest Took Place After Court Hours and Time Was of the Essence

It is respondent's position that the validity of the present search is governed by the then-existing law, and that the new rules established by this Court's decision in *Chimel v. California,* 395 U.S. 752, apply only to searches conducted after the date of that decision. (*See* Argument III herein.) However, in the alternative respondent submits that the present search and seizure passes muster even under *Chimel.*

The *Chimel* decision holds that as a *general* rule a search incident to arrest is unlawful, and its fruits therefore inadmissible, if the search has extended beyond the person of the arrestee and his reach. In effect the Court imposed a requirement that, "in the absence of well-recognized exceptions", searches of premises must be pursuant to the advance judicial authorization of a search warrant. *Chimel v. California,* 395 U.S. 752, 762-63.

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ficer might feel constrained, particularly in light of the possibility of exposure to civil liability, not to search until absolute verification of the suspect's identity was obtained, or a search warrant obtained, by which time any evidence on the premises might well have been disposed of.

[10]"Indeed, since the Fourth Amendment prohibits only *unreasonable* searches and seizures, it could be argued that there was, in fact, no Fourth Amendment violation in the present case. The law enforcement officers could certainly be said to have been acting 'reasonably' in measuring their conduct by the relevant Fourth Amendment decisions of this Court. [Citing cases.]" (Emphasis by the Court.) *Desist v. United States,* 394 U.S. 244, 254 (n.23).

It is clear from the Court's opinion that it was not intended to bar warrantless searches of premises under all circumstances, and certainly not where it was impracticable to obtain a search warrant.

The Court quoted with approval the following language from *Trupiano v. United States,* 334 U.S. 699, 705, 708:

> " 'It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants *wherever reasonably practicable. . . .*
>
> " 'A search or seizure without a warrant as an incident to a lawful arrest . . . grows out of the *inherent necessities of the situation at the time of the arrest.* But there must be something more in the way of necessity than merely a lawful arrest.' " (Emphasis added.)
>
> *Chimel v. California,* 395 U.S. 752, 758-59.

Quoting from *McDonald v. United States,* 335 U.S. 451, 456, the Court stated:

> " '. . . We cannot . . . excuse the absence of a search warrant *without a showing . . . that the exigencies of the situation made that course imperative.*' " (Emphasis added.)
>
> *Chimel v. California, supra* at 761.

Similarly, the Court noted:

> "Only last Term in Terry v. Ohio, 392 U.S. 1, we emphasized that 'the police must, *whenever practicable,* obtain advance judicial approval of searches and seizures through the warrant procedure,' . . . and that '[*t*]*he scope of* [*a*] *search must*

> *be strictly tied to and justified by the circumstances* which rendered its initiation permissible.'" (Emphasis added.) *Supra* at 762.

The Court's new rule was intended to preclude arresting officers from "*routinely* searching rooms other than that in which an arrest occurs." (Emphasis added.) *Supra* at 763. The Court "[saw] no reason why, *simply* because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should *automatically* be allowed despite the absence of a warrant." (Emphasis added.) *Supra* at 767 (n.12).

Mr. Justice White, joined by Mr. Justice Black, observed in the *Chimel* case:

> "The Court has always held, and does not today deny, that when there is probable cause to search and it is 'impracticable' for one reason or another to get a search warrant, then a warrantless search may be reasonable." *Supra* at 773 (dissenting opinion).

Applying these principles to the search before it, the Court in *Chimel* saw "no constitutional justification" for a warrantless search extending beyond the reach of the suspect. *Supra* at 768. As disclosed by the opinion of the California Supreme Court in the *Chimel* case, for several weeks prior to his arrest and the search of his house, the defendant was considered the prime suspect by the arresting officer and there was therefore ample time to obtain a search warrant. *People v. Chimel,* 68 Cal. 2d 436, 438-39 (1968) [439 P.2d 333, 334-35]. A warrant for the defendant's arrest was obtained in *Chimel* (and was not executed for several hours),

and presumably a search warrant could easily have been obtained and executed at the same time. *Chimel v. California,* 395 U.S. 752, 767 (n.13). Furthermore, the search in *Chimel* extended "through the entire three-bedroom house, including the attic, the garage, and a small workshop." *Supra* at 754.

All of the foregoing circumstances present in *Chimel* contrast markedly with the situation confronting the arresting officers in the present case.

The robbers left the Georgiade residence at approximately 10:30 p.m. on June 4, 1966. (R. 30.) It was only during the six or seven hours preceding the arrest of Miller that Sergeant Gastaldo accumulated the information which gave him probable cause for the arrest. (R. 61.) Sergeant Gastaldo learned of Baum's and Bader's arrest and of the fact that a radio stolen from the Georgiades was found inside the vehicle driven by the two men at the time of their arrest. (R. 36-37.) The officer checked with Mr. Georgiade as to the ownership of the radio. (R. 56.) He also checked field interrogation cards which provided information concerning Baum and Bader and their association with petitioner. (R. 38-39, 54-55.) Sergeant Gastaldo also conferred with another officer concerning petitioner, and made a check as to the vehicle owned by petitioner. (R. 55.) And at 5:30 p.m. that same day, Sergeant Gastaldo had a conversation with Baum and Bader in which they implicated petitioner in the Georgiade robbery and informed the officer that the guns and the stolen property connected with that robbery could be found at petitioner's apartment at a specified address. (R. 37, 39, 56.) It was approximately 8:15 that evening when the officers knocked at petitioner's door and were confronted by Miller. (R. 56.)

Thus the arrest and search in the present case were made less than 48 hours after the commission of the offense and apparently only a couple of hours after the arresting officers obtained from their investigation sufficient information constituting probable cause for the arrest. They obtained this information in the early evening hours, after regular court hours, and would have had to wait well over twelve hours to obtain a search warrant.

The officers knew that there was a fourth participant, in addition to petitioner and the two men in custody, involved in the Georgiade robbery. (R. 53.) The members of the gang were known to have committed several other robberies in the area (R. 55), to be very dangerous, as evidenced by the vicious and unprovoked assault on Mr. Georgiade (R. 11-13, 24), and to be armed with guns. (R. 55.) The fourth participant, one Baca, was still at large and in fact was later arrested by Sergeant Gastaldo at a print shop twenty-four hours after Miller's arrest. (R. 36, 41-42.) Baum and Bader had told the officers that "the guns used in the robbery" and "the remaining property" from the Georgiade robbery were at petitioner's apartment. (R. 56.)

Thus the officers were confronted with what was very close to a "hot pursuit" situation. *See Warden v. Hayden*, 387 U.S. 294, 298-300. They had three very good reasons for not delaying petitioner's arrest until the next morning when they could secure a search warrant for the search of petitioner's apartment.

First, petitioner and Baca, armed and dangerous men, were at large and could well be engaged in commiting other assaults and robberies. Secondly, Baum's and Bader's arrests might alert petitioner to flee from his

apartment and possibly from the jurisdiction. And thirdly, if petitioner were arrested that evening and the search delayed until the next day when a search warrant could be procured, Baca, perhaps alerted by petitioner's (and Baum's and Bader's) arrests and realizing that the arresting officers might have observed incriminating evidence while arresting petitioner, might remove the weapons, the disguises, and the stolen property from petitioner's apartment. In this context it is significant that Baum and Bader apparently indicated that *both* guns and *all* the remaining property were at petitioner's apartment. (R. 56.) This supports the inference that Baca (like Miller) probably had access to petitioner's apartment, even in petitioner's absence.

In short, this was not a case where the arresting officers were "routinely" or "automatically" dispensing with the necessity of obtaining a search warrant. *Chimel v. California,* 395 U.S. 752, 763, 767 (n.12). Instead it was not "reasonably practicable" that a search warrant be obtained, and the "exigencies of the situation" made it imperative that petitioner be arrested forthwith and his apartment searched incident thereto and without delay. *Supra* at 758, 759.

Respondent submits that the arresting officers had a duty to act expeditiously under the circumstances confronting them on the evening of June 6, 1966, and not to delay the arrest and search to the next day.

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential. . . ."
>
> *Warden v. Hayden,* 387 U.S. 294, 298-99.

III

The New Rule Announced in Chimel, Invalidating Procedures Expressly Sanctioned by Several Decisions of This Court, Should Be Applied Only to Cases in Which the Search Took Place After the Date of That Decision

Although it is respondent's position that the validity of the present search and seizure can readily be sustained under the new rule announced in *Chimel v. California*, 395 U.S. 752, it is urged that the Court reject petitioner's argument that *Chimel* should be given retroactive application to the case at bar.

> ". . . [T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. . . ."
>
> *Johnson v. New Jersey*, 384 U.S. 719, 728.

Thus, the decision in *Mapp v. Ohio*, 367 U.S. 643, extending the exclusionary rule to the states, was denied fully retroactive application to defendants whose convictions were final but was not denied retroactive application to defendants whose convictions were still pending on direct appeal, *Linkletter v. Walker*, 381 U.S. 618, 622, 639-40, while the decision in *Katz v. United States*, 389 U.S. 347, involving another facet of the same Amendment to the Constitution, was confined to searches conducted after the date of *Katz*. *Desist v. United States*, 394 U.S. 244, 254.

As was stated in *Desist,* the Court has viewed the retroactivity or nonretroactivity of decisions expounding new constitutional rules affecting criminal trials "as a function of three considerations."

> "As we most recently summarized them in Stovall v. Denno, 388 U.S. 293, 297, 'The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' "

Desist v. United States, 394 U.S. 244, 249.

In two *per curiam* decisions which came down the same day as the *Chimel* opinion, the Court expressly left for a later day the question whether *Chimel* should be given retroactive application, since in neither case did the record before the Court require resolution of that issue.

Shipley v. California, 395 U.S. 818, 819;

Von Cleef v. New Jersey, 395 U.S. 814, 815.

In the five months' interim between the decision in *Chimel* and the preparation of this brief, the following decisions passing upon this point have come to respondent's attention.

Five Circuits of the United States Court of Appeals have discussed the issue of *Chimel's* retroactivity in their opinions. The Second Circuit and the Fifth Circuit decided that *Chimel* was applicable only to searches conducted after the date of that decision.

United States v. Charles T. Bennett, et al., ... F. 2d ..... (2d Cir., No. 214-216, decided September 9, 1969, on petition for rehearing [summarized in 6 Crim. L. Rptr. 2016];[11]

Winfield H. Lyon, Jr. v. United States, ... F. 2d ..... (5th Cir., No. 26190, decided September 4, 1969) [summarized in 6 Crim. L. Rptr. 2055].

Opinions of three of the Federal Circuits have discussed the question but held that the cases before them did not require its resolution.

Colosimo v. Perini, 415 F.2d 804, 806 (6th Cir. 1969);

Allen Levair Jordan et al. v. United States, ... F.2d ..... (9th Cir., No. 22,668, decided September 15, 1969) [summarized in 6 Crim. L. Rptr. 2061-62];

United States v. Danny Baca et al., ... F.2d ..... (10th Cir., Nos. 112-69, 113-69, decided September 30, 1969) [summarized in 6 Crim. L. Rptr. 2084-85].

The California Supreme Court has limited the application of *Chimel* to cases in which the search was conducted after the date of that decision. *People v. Edwards*, 71 A.C. 1141, 1152-55 (1969) [458 P.2d 713, 720-21].[12]

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[11]An earlier decision, *Maynard Prater etc. v. Mancusi*, ... F. Supp. .... (S.D. N.Y., No. 69 Civ. 1999, decided July 21, 1969) [summarized in 5 Crim. L. Rptr. 2365], reaches the same conclusion.

[12]Reported decisions of three other states on this question have come to respondent's attention. The Maryland Court of Special Appeals came to the same conclusion as the California Supreme Court. *Scott v. State*, 256 A.2d 384, 389-92 (Md. 1969).

Respondent submits that application of the three fundamental criteria reiterated in *Desist* compel the conclusion that *Chimel* should be applied only to cases in which the search was conducted after the date of that decision (June 23, 1969).

The "purpose to be served by the new standards" clearly favors prospective application since the Fourth "Amendment is designed to prevent, not simply to redress, unlawful police action." *Chimel v. California*, 395 U.S. 752, 766 (n. 12).

> "'[A]ll of the cases . . . requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved.' [Citation.]
>
> "We further observed that, in contrast with decisions which had been accorded retroactive effect, 'there is no likelihood of unreliability or coercion present in a search-and-seizure case; the exclusionary rule is but a 'procedural weapon that has no bearing on guilt,' and 'the fairness of the trial is not under attack.'" (Footnotes omitted.)
>
> *Desist v. United States*, 394 U.S. 244, 249-50, quoting *Linkletter v. Walker*, 381 U.S. 618, 636-37, 638-39.

A decision of the New Mexico Court of Appeals has applied *Chimel* to a pending appeal without any mention of the question of retroactivity. *State v. Thomas Jefferson Rhodes*, ... P.2d .... (No. 298, decided August 1, 1969) [summarized in 5 Crim. L. Rptr. 2366]. The Alaska Supreme Court has decided to apply *Chimel* to all cases pending on direct review before that court. *Fresneda v. State*, 458 P.2d 134, 143 (n.28) (Alaska, 1969).

In *Fuller v. Alaska,* 393 U.S. 80, the same principles were applied in an analogous area (evidence obtained in violation of section 605 of the Federal Communications Act) to give only prospective application to the exclusionary rule announced in *Lee v. Florida,* 392 U.S. 378.

Lest it seem inconsistent that, in *Linkletter, Mapp* was given partially retroactive application to all cases pending on direct appeal, it is noted that the

> ". . . holdings in Linkletter and Tehan were necessarily limited to convictions which had become final by the time Mapp and Griffin were rendered. Decisions prior to Linkletter and Tehan had already established *without discussion* that Mapp and Griffin applied to cases still on direct appeal at the time they were announced." (Emphasis added.)
>
> *Johnson v. New Jersey,* 384 U.S. 719, 732.
>
> *See also Linkletter v. Walker,* 381 U.S. 618, 622.

In the present case, however, the possibility of applying *Chimel* prospectively is ". . . yet an open issue."

> *Johnson v. New Jersey, supra* at 732.

The "extent of the reliance by law enforcement authorities on the old standards" and the "effect on the administration of justice of a retroactive application" militate strongly against application of the new rule announced in *Chimel* to any search conducted prior to June 23, 1969.

The holding of *United States v. Rabinowitz,* 339 U.S. 56, 65-66, decided in 1950, that "searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search

warrant, for the warrant is not required," was cited by this Court with approval as recently as 1967 (the year after the search in the present case took place). *Cooper v. California,* 386 U.S. 58, 62. *See also Ker v. California,* 374 U.S. 23, 41. As recently as 12 months prior to the decision in *Chimel,* one of the majority in that case cited *Rabinowitz* for the proposition that "an officer arresting on probable cause is entitled to make a very full incidental search."

> *Sibron v. New York,* 392 U.S. 40, 77 (concurring opinion of Mr. Justice Harlan).

Although the Court in *Chimel* made the observation that "Rabinowitz and Harris have been the subject of critical commentary for many years and have been relied upon less and less in our own decisions" (footnotes omitted), *Chimel v. California, supra* at 768, this is not to say that the *Chimel* decision should have been anticipated by law enforcement. Clearly "even the most conscientious police department or judge had no reason to doubt the validity" of the *Rabinowitz* rule. *Desist v. United States,* 394 U.S. 244, 266 (n.5) (concurring opinion). The Court noted in *Chimel* that its decisions "bearing upon that question have been far from consistent, as even the most cursory review makes evident." *Supra* at 755. *See also supra* at 765 and n.10, and *supra* at 771-72 (dissenting opinion). The Court stated, "It is time . . . to hold that" *Rabinowitz* and *Harris v. United States,* 331 U.S. 145, "are no longer to be followed." *Chimel v. California, supra* at 768.

In the face of a claim that *Katz v. United States,* 389 U.S. 347, "merely confirmed the previous demise of obsolete decisions," the Court in *Desist v. United States,* 394 U.S. 244, noted that despite growing judicial dissatisfaction with prior case law, the Court had reiterated the old standards and that its holding in *Katz,* even if foreseeable, "was a clear break with the past." *Supra* at 247, 248. Even more so in the present case, there can be no doubt that the new rule announced in *Chimel* represents a radical departure from the current law of search and seizure.

In the *Chimel* case Mr. Justice Harlan prophetically stated, "we do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision." *Chimel v. California,* 395 U.S. 752, 769 (concurring opinion). The burden on law enforcement in having to adjust to the new procedures required by *Chimel* has been severe, and the necessity of retrying the multitude of cases in which convictions were obtained in reliance on *Rabinowitz* and *Harris* would probably bring the machinery of criminal justice to a halt in many populous counties.

See Desist v. United States, 394 U.S. 244, 251-52;
Linkletter v. Walker, 381 U.S. 618, 637-38.

The District Attorney of Los Angeles County, which has a population of over 7,000,000, has estimated that "as many as 90% of the cases scheduled for trial could be affected in some way" by the Court's decision in

Chimel. He added "that if the ruling is made retroactive it could cause an unprecedented, massive log jam in trial courts."

The Los Angeles Times, June 25, 1969, p. 3.

The fact that, in the short time in which respondent's Petition for Rehearing in *Chimel* could be filed, 70% of the States joined in requesting that the Court's decision be reconsidered points out the impact of the decision on the current state of the law.

The Los Angeles Municipal Court, as well as some of the other courts in Los Angeles County, has placed judges on call at home during nights and weekends, specifically because of the *Chimel* decision, in order to be available to issue search warrants.[13]

Respondent submits that the three fundamental criteria which have guided this Court in deciding whether a new rule of constitutional law is to be given retroactive application compel the conclusion that the new principles announced in *Chimel v. California,* 395 U.S. 752, should be applied only to searches conducted after June 23, 1969, and therefore not to the search involved in the present case. Retroactive application of *Chimel* would not serve to further the purposes set forth in that opinion and would only needlessly punish law enforcement for its justified belief that it could rely on this Court's prior decisions defining the scope of permissible search incident to arrest.

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[13]Memorandum dated July 16, 1969, from the Presiding Judge to all judges of the Los Angeles Municipal Court.

Conclusion

For the foregoing reasons respondent State of California submits that the search of petitioner's apartment was lawful and the fruits of that search properly admitted at petitioner's trial. It is therefore urged that the judgment of the California Supreme Court upholding petitioner's conviction of two counts of robbery and one count of kidnaping be affirmed as to all counts.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

RONALD M. GEORGE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~730~~ 51

ARCHIE WILLIAM HILL,

Petitioner.

vs.

CALIFORNIA

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

KEITH C. MONROE
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1428 No. Broadway
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INTEREST OF AMICUS CURIAE

Counsel is attorney of record for A. Terry Carter in a case now pending but not yet tried, in the Superior Court, County of Los Angeles, California ,*People v. Bailey, Carter, et al*, No. A-002539. That case, like the one at bar, involved a search of an entire apartment without warrant and which was not supported by a valid arrest on the premises, all conducted prior to this Court's decision in *Chimel v. California*, 395 U. S. 752 (June 23, 1969). The significant item seized in the Carter search was a personal notebook and its admissibility will seemingly be controlled by the decision in this case since the California appellate courts, on due application, have refused to suppress its use as evidence. Counsel, in addition, represented the Petitioner in *Chimel* in the California courts and before this Court and is therefore familiar with the authorities and reasoning involved in that decision. Counsel is also interested on behalf of the Orange County Criminal Courts Bar Association, an organization of some 100 attorneys who are actively engaged in trial of California criminal cases and who represent an estimated 40 cases which will be affected by decision of this case.

Consent To Filing Amicus Brief

In accordance with Rule 42 of this Court, consent of the parties to filing of an *amicus curiae* brief was sought. Counsel for Respondent, Ronald M. George, Esq. advised on November 26 that Respondent would not consent. If this motion be granted, counsel, in order to avoid delay, is prepared to file a brief within ten days of notice of such action.

Questions Not Adequately Presented

The facts of this case present two fundamental questions:

1. Under the rules announced in *Harris v. United States*, 331 U. S.145 (1946) and *United States v. Rabinowitz*, 339 U. S. 56 (1950). Is it constitutionally permissible to use evidence obtained as fruit of a warrantless search of an entire dwelling based on the mistaken-identity arrest of the sole occupant of the premises?

2. What constitutional standard is applicable to searches which were conducted prior to decision of *Chimel v. California*, 395 U. S. 752 (June 23, 1969)?

A) Is the rule announced in *Chimel* applicable to cases which were on direct appeal on the date of that decision?

B) May private papers which are not contraband be seized in the course of a warrantless search of a dwelling under *Harris* or *Rabinowitz?*

ARGUMENT

Search Incident To An Invalid Arrest

This motion is addressed primarily to the second question presented and the two sub-questions which are necessarily there involved. However, as to the first question it is suggested that one of the major policies protected by the Fourth Amendment is subjected to a wrenching test by the opinion of the lower court. As petitioner observes, this Court's cases which have in the past approved warrantless searches "incident" to arrest have always revolved about a valid arrest. Certainly, the instant situation involves the clearest sort of invalid arrest—it was concededly an arrest of the wrong person. It would seem that the Court would be aided in examination of this question by some review of the historical bases and case authorities which have been held to justify searches conducted without warrant. While the author-

ities relied upon by Petitioner are indeed proper authorities, it is urged that examination of the logical and time-tempered bases of Fourth Amendment prohibitions and exceptions is necessary to considered resolution of the often-recurring questions. Mr. Justice Frankfurter, in his memorable prose, phrased it:

> What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response. *United States v. Rabinowitz*, 339 U. S. 56, 83 (dissenting opinion).

For the foregoing reasons, and despite the holding of the lower court to the effect that an arrest of the wrong person is a valid arrest, it is urged that briefing and argument of the historical bases which have supported searches incident to arrest is necessary to an adequate presentation of the first question noted above.

Standards Applicable To This Search

Although *amicus curiae* is, understandably, rather strongly in favor of retroactivity not only of *Chimel* but of all fundamental Constitutional principles, this may well be a case where it is not necessary to reach that difficult question. Whether or not this is true, though, it would appear essential to the case that both sub-questions set forth above must be simultaneously dealt with. Thus, if the second question is reached, the possible courses of decision would appear to be:

1. *Chimel* is applicable to cases on direct appeal.
2. *Chimel* is applicable to searches conducted on or after

June 23, 1969 only, and searches occurring prior to that date will be considered in light of *Harris*, subject to the narrow limitations imposed on that case by *Rabinowitz*.

3. *Chimel* will be given prospective application only and any prior misinterpretation of *Harris* and *Rabinowitz* need not now be considered, since those cases have been overruled.

Indeed, if these are the possible alternative decisions on this rather thorny issue, then it would appear that discussion and examination of this Court's three latest cases which bear heavily an the two related sub-questions is imperative. Those cases are: *Desist v. United States*, 394 U. S. 244 (1969); *Von Cleef v. New Jersey*, 395 U. S. —— (1969)* and *Shipley v. California*, 395 U. S. —— (1969).** None of these cases appear in the Petitioner's authorities.

Furthermore, it seems clear, from this court's known practice of warning by hint in earlier cases of decisions to follow, that the matter of retroactivity or at least of standards for warrantless searches prior to June 23, 1969, is of some serious concern. As Mr. Justice Harlan pointed out in his concurring opinion in *Von Cleef*, that case appears to suggest a more stringent application of *Harris* while at the same time specifically reserving decision on the question of retroactivity of *Chimel*. In fact, it seems most difficult to square *Von Cleef* with *Abel v. United States*, 362 U. S. 217 (1960). It is therefore urged that additional briefing on these authorities and issues is necessary to a just resolution of this case.

Finally, although the point is touched on by Petitioner, this case seems to involve a peculiarly difficult problem with the now discredited "mere evidence" rule. Of course that rule, soundly

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* 23 L. ed. 2d 728

**23 L. Ed. 732

criticized as it was during its period of vitality. has since gone the way of *Harris* and *Rabinowitz*. Nevertheless, as the Court eloquently observed in *Boyd v. United States*, 116 U. S. 616 (1885) there arise many occasions when the protections of the Fourth and Fifth Amendments overlap. Indeed, the gravest problems are presented when, as in this case, the seizure is of that one most personal and private possession, a man's secret diary. One might well ask whether a seizure of private property without warrant is ever constitutionally permissible when the property involved or the circumstances are such that no warrant could have been legally obtained. Suppose a magistrate had stood at Hill's door just before it was opened, with all necessary papers before him, could he have issued a valid warrant to search for and seize, or for that matter even to read, Hill's diary? If not, then it follows that a seizure which may not be carried out under warrant certainly may not be done without warrant. To suggest otherwise is to suggest repeal of the Fourth Amendment .This no court may do. Since the landmark case relative to the "mere evidence" rule, *Warden v. Hayden*, 387 U. S. 294 (1967) has not been examined by Petitioner, it is believed that additional briefing on the point might be of aid to the Court.

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully requested that the Court make its order granting counsel leave to file a brief in this cause as *amicus curiae*.

KEITH C. MONROE
Amicus Curiae in
Support of Petitioner

IN THE

Supreme Court of the United States

October Term 1969
No. ~~700~~ 51

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

Opposition to Motion for Leave to File Brief Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term 1969
No. 730

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

Opposition to Motion for Leave to File Brief Amicus Curiae.

Respondent hereby opposes the Motion for Leave to File Brief Amicus Curiae filed by Keith C. Monroe, Esq. Respondent's opposition is based upon the following grounds:

1. Mr. Monroe has not advanced any substantial interest that he has in the present case. He states that he wishes to support petitioner because he represents a defendant in criminal proceedings pending in the Los Angeles Superior Court and that the proceedings involve the issue of the retroactivity of this Court's decision in *Chimel v. California*, 395 U.S. 752, an issue which this Court may reach in the present case. This interest on the part of Mr. Monroe does not distinguish

him from most of the thousands of other attorneys engaged in criminal practice in the United States.

2. The motion is not timely filed. Rule 42(2) of the Rules of this Court requires that the brief of an amicus curiae be "presented within the time allowed for the filing of the brief of the party supported." The Petition for Writ of Certiorari in the present case was filed on March 7, 1969, and certiorari was granted October 13, 1969. Petitioner's Brief and Respondent's Brief have both been filed with this Court.

3. In view of the fact that Respondent's Brief has already been filed, the filing of a Brief Amicus Curiae would cause unnecessary expense to respondent, in that respondent would probably have to file a Reply Brief to the Brief Amicus Curiae.

4. In view of the circumstances set forth in paragraphs (2) and (3) herein, the filing of a Brief Amicus Curiae would substantially delay disposition of the present case which, the Clerk has informed respondent, is tentatively scheduled for oral argument on the January calendar. This is so despite Mr. Monroe's representation that he would file his brief within ten days of the Court's granting his motion.

5. Mr. Monroe's motion does not indicate any substantial facts or questions of law that have not been adequately presented by petitioner, whom he seeks to support. *See* Rule 42(3). In fact, the major portion of Mr. Monroe's motion is directed to an issue purportedly arising under the Fifth Amendment—an issue which is improperly raised before this Court since it was not raised or decided in any of the state courts and further was not specified in the Petition for Writ of Certiorari. (*See* Resp. Br. p. 28.)

For the foregoing reasons respondent submits that the Motion for Leave to File Brief Amicus Curiae should be denied.

Respectfully submitted,

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Attorneys for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~730~~ 51

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 730

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

ARGUMENT

The Petitioner Contends That the Police Search and Seizure of the Petitioner's Diary Was Illegal Prior to Chimel.

The respondent argues that because there was a pistol on a coffee table in the apartment and Miller told the officers that he had not seen any guns in the apartment, that this suspicious conduct reinforced the officers' belief that the man was Petitioner attempting to evade arrest and search.

There is nothing in the record that gives any indication whatsoever either by circumstantial evidence or by testi-

mony, that Miller was attempting to evade arrest and search. Miller himself was not armed and Miller was arrested immediately after answering the door. Miller made no overt acts to evade arrest from the four arresting officers. By the number of officers present and by the weapons they displayed, including two shotguns, this would seem to preclude any attempt by Miller to evade arrest and search.

Respondent further contends that Miller aroused further suspicion by indicating his total ignorance as to Petitioner's whereabouts, stating that no one else was present and that he was just sitting around waiting for Hill. The respondent argues further that, although the door to the apartment had a lock, Miller was unable to give any satisfactory explanation for his presence.

The Petitioner is uncertain what is required for a "satisfactory" explanation. Miller told the officers he was not Hill and confirmed this fact by showing the officers personal identification that he was Miller and that he just came into the apartment and was waiting for Hill to come back. Miller told the officers he did not live in the apartment and he did not know where Hill was.

The fact that there was a lock on the door is not so unusual, there is nothing in the record to reflect any evidence that the door was locked prior to Miller entering the apartment. Miller was a visitor in the Petitioner's apartment and the fact that he didn't see the pistol on the coffee table doesn't appear to be an unusual circumstance. The police are trained to observe these sorts of things, while a visitor to someone's apartment could easily overlook an object of this sort.

The respondent points out that the only disparity between the appearance of Miller and Petitioner was that Petitioner was two inches shorter at five foot ten inches, and ten pounds lighter, and then cites *Draper* v. *United States,* 358 U.S. 307 as his first authority.

In the case at bar, we are dealing with a very general description of identification by a lay person of what the Petitioner looked like. The arresting officer testified at the trial regarding other areas of similarities between Petitioner and Miller; the answers given by the officer were either ambiguous or the officer couldn't recall. [Appendix 62]

In the *Draper* case, the agents had a very detailed physical description of Draper and of the clothing he was wearing and also were informed that he would be carrying a tan zipper bag and that he habitually walked real fast.

All of the aforesaid information was observed by the agent at the train station, along with information received showing where Draper would be. Furthermore, the agent and a Denver police officer kept watch over all incoming trains from Chicago and did not see anyone fitting the description of Draper until the second day of their search. More important, when the officer made the arrest pursuant to their information, they arrested the proper man.

The respondent argues the possibility that Bader's authority is sufficient to search Petitioner's apartment on the basis that Bader told the officer he "could go" to Petitioner's apartment. First of all, telling an officer he can go to Petitioner's apartment is a far different thing from consenting to a long and detailed search of the apartment. Secondly, Bader was being held in custody by the police

and he doesn't have the right to strip the Petitioner of his personal constitutional guarantees.

In *Tompkins* v. *Superior Court* (1963), 59 C 2d 65, 378 P 2d 113, police officers lawfully arrested N in his car in possession of marijuana. He was asked about other narcotics in his apartment, denied that there were any, and gave the officers his keys to confirm this fact. The officers, acting under this consent and without a warrant, called at the apartment, where petitioner refused them admittance. They broke in, finding marijuana.

The Court held the search was *illegal*. There was no basis for a good faith belief that N had authority to consent to the search. Under the law of real property, one co-tenant cannot lawfully do anything to the prejudice of the others, and a joint occupant's right of privacy is not completely at the mercy of the other occupant.

The personal diary that was seized in this case was in no way connected with the crime. The Courts in the past, for the most part, have distinguished this type of evidence from evidence connected with the crime. Congress has never authorized the issuance of search warrants for the seizure of mere evidence of crime. *Davis* v. *U. S.*, 328 U.S. 582.

In *Warden* v. *Hayden*, 387 U.S. 294, it was noted that the articles of clothing admitted into evidence were not within any of the traditional categories which describe what materials may be seized either with or without a warrant. In the *Hayden* case, the clothes found in the washing machine matched the description of those worn by the robber and the police could therefore reasonably believe that the items would aid in the identification of the robber.

The Court in *Hayden* by the majority opinion, went on to state, "But if its rejection (mere evidence rule) does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularly requirements of the Fourth Amendment and after the intervention of a neutral and detached magistrate".

The Court also stated, "in the case of mere evidence, probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." It is the Petitioner's contention that the diary seized by the police is clearly distinguishable from the other items seized.

Even assuming the mistaken arrest of Miller was valid, this would not authorize the police to make anything but an incidental search to the arrest, not an exploratory search for every conceivable personal belonging of Petitioner, as was made in the case at bar.

It appears in reading past case opinions by this Court regarding Fourth Amendment principles that this Court has never gone to the point that once they allow the police to search a person's home by constitutionally accepted exceptions that this gives the police an open end invitation to search and seize wherever and whatever they choose to do, totally disregarding a citizen's privacy as to items completely unrelated to the reasons for the search or evidence of other crimes.

The Court stated in *Abel* v. *United States*, 362 U.S. 217 that, "We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers

desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled* v. *United States,* 255 U.S. 298, 310, nor may the Government seize, wholesale, the contents of a house it might have searched, *Kremen* v. *United States,* 353 U.S. 346."

The Petitioner contends there is a sharp distinction between the search and seizure of the Petitioner's personal diary from his bedroom drawer and the other items seized by the police that had some relationship to the cause of the search. It would seem not to distinguish between the diary which had absolutely no connection with the crime and the other items seized by the police that did, would have eroded the Fourth Amendment to a point where it afforded very little protection from the police in the invasion of a citizen's privacy.

Chimel Should Be Given a Limited Retroactive Effect at Least to Those Cases on Direct Appeal.

The respondent argues the cases to suggest *Chimel* should not be given retroactive effect, on the basis that the exclusion of illegal evidence by the Courts has been based on the necessity for an effective deterrent to illegal police action. The respondent goes on to state in effect that since the misconduct of the police has already occurred, it would be impossible to curb the past misconduct of the police by having the evidence excluded in this case.

It is just this type of reasoning that the police rely on to illegally invade the privacy of citizens in their home. The police are well aware that the machinery of the Court takes considerable time (such as three and a half years in

this case) before their overzealousness to obtain evidence and a conviction will be curtailed by the Courts.

In the meantime, the police know that any encroachments they make upon the Fourth Amendment will certainly invade the privacy of many private citizens, but also knowing they will also get more illegally obtained evidence against criminals.

The Fourth Amendment, declaring that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", forbids every search that is unreasonable, and protects those suspected or known to be offenders as well as the innocent. *Go-Bart* v. *U. S.*, 282 U.S. 344-358.

The respondent also quotes a newspaper article in the Los Angeles Times wherein the District Attorney of Los Angeles County, a populous county with over 7,000,000 persons, estimated that "as many as 90% of the cases scheduled for trial could be affected in some way by the Chimel case", further adding that the ruling in *Chimel* if made retroactive, could cause a massive log jam in the trial courts.

The *Chimel* decision when it was first announced, made headlines on the front pages of many newspapers including the Los Angeles Times. The District Attorney of Los Angeles County was severely criticized by many because of the aforesaid statements directed to the general public which implied that 90% of the defendants scheduled for trial might go free as a result of this decision.

Nothing was further from the truth. In fact, the District Attorney, on television news interviews after this article

was printed, admitted that in the overwhelming majority of the cases pending at that time, there would be very little impact. The District Attorney went on to explain that just a relatively few cases would seriously be affected by the decision since in most cases the other evidence that was legally obtained would be sufficient to obtain a conviction.

For substantially the same reasons, the Petitioner contends it is reasonable to believe just a small percentage of cases would be reversed on basis of *prejudicial* error above those relatively few cases that would be reversed on the grounds the illegally obtained evidence was the only evidence obtained.

Granted, some new trials would be required, if *Chimel* is given even limited retroactive effect (such as to apply to those cases on direct appeal), and some defendants would be set free altogether. However, it would seem to take a real pessimist to speculate that the judiciary machinery would come to a grinding halt because *Chimel* was given partial retroactive effect.

If you take the other side of the coin, you would never hear that the judicial processes should be avoided or cases dismissed merely because there is a sudden dramatic increase in the number of criminal cases that have to be prosecuted. The judicial machinery should be and, in fact, is extremely flexible even in large counties.

For example, the Courts in Los Angeles County were commended highly for their efficient and orderly manner in which they handled the hundreds and hundreds of defendants arrested during the course of the Watts riot in 1965.

The defendants involved in this infamous riot were afforded constitutional fair trials, without unreasonable de-

lay, and without materially affecting the normal criminal calendar. Certainly by citing the aforesaid example, it is not suggested here, that by making *Chimel* partially retroactive, it will have the practical effect of creating a sudden dramatic increase in the courts' work-load, but this example is merely used to point out and illustrate that the courts generally would be equipped to handle those cases that do require re-trial.

In conclusion, the Petitioner respectfully submits again that *Chimel* is no sudden departure from *Rabinowitz* and *Harris,* and as the respondent quoting *Chimel* pointed out, this Court has relied upon "Rabinowitz and Harris less and less in our own decisions".

As a practical matter, the Grand Jury of Los Angeles County has been investigating police practices in this exact area in question during 1969, and members of the Grand Jury have already stated they are extremely concerned with inconsistent police procedure in search and seizure cases. Police procedure in Los Angeles came to the attention of the general public in a dramatic way when four law enforcement men, two armed with shotguns, left a local bar after a couple of drinks, entered an apartment to search for narcotics, and while causing quite a ruckus, accidentally shot and killed a completely innocent twenty-one year old man in a different apartment, and inflicted injury to his baby that he was holding.

By making *Chimel* partially retroactive to cases on direct appeal, it will have the practical effect of allowing the police sufficient means to accomplish their difficult job and still provide the continuous protection the Fourth Amendment was intended to provide by the makers.

For the above stated reasons, the Petitioner respectfully requests that the illegally obtained evidence, in particular the personal diary of the Petitioner, be excluded from evidence and the conviction of the Petitioner be reversed.

Respectfully submitted,

JOSEPH AMATO
Attorney for Petitioner

No. 51

Supplement to respondent's
brief filed on Jan 17, 1970
(not printed)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. [redacted] 51

ARCHIE WILLIAM HILL, JR., Petitioner

vs.

STATE OF CALIFORNIA, Respondent

On Writ of Certiorari to the Supreme Court of the State of California

---

Motion for Leave to File a Brief as Amicus Curiae and Brief of the Attorney General of the State of Colorado, the Denver, Colorado Police Department, the International Association of Chiefs of Police, Inc., Americans for Effective Law Enforcement, Inc., and the Law Enforcement Legal Unit, Inc., as Amicus Curiae in support of Respondent.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 730

ARCHIE WILLIAM HILL, JR., Petitioner

vs.

STATE OF CALIFORNIA, Respondent

On Writ of Certiorari to the Supreme Court of the State of California

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Motion for Leave to File a Brief as Amicus Curiae and Brief of the Attorney General of the State of Colorado; the Denver Colorado Police Department; the International Association of Chiefs of Police, Inc.; Americans for Effective Law Enforcement, Inc.; and the Law Enforcement Legal Unit, Inc. as Amicus Curiae in Support of Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Attorney General of the State of Colorado, the Denver Colorado Police Department, the International Association of Chiefs of Police, Inc.; Americans for Effective Law Enforcement, Inc.; and the Law Enforcement Legal Unit, Inc. respectfully move the Court for permission to file this brief as Amicus Curiae

INTEREST OF THE AMICUS CURIAE

Each of the parties joining in this brief as Amicus Curiae has a specific and vital interest in the effectiveness of law enforcement within our constitutional framework.

1. The Attorney General of the State of Colorado, the Honorable Duke W. Dunbar, is the chief legal officer of that state and, as such, is concerned with the effectiveness of the state and local law enforcement agencies throughout Colorado.

2. The Denver Police Department, George L. Seaton, Chief of Police, is the largest police department in Colorado, responsible for enforcing the law in a city of over half a million population; as such, the Denver Police Department is directly affected by the decisions of this Court in the area of the criminal law.

3. The International Association of Chiefs of Police, Inc., (IACP) represent 5,751 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP has nearly 8,000 members and an executive staff headed by Quinn Tamm, Executive Director. The IACP has taken the lead in the rapid strides that have been taken towards the professionalization of the police of this country through training, through the establishment of professional standards, and through consultation with police departments. The IACP is committed to the principle that a direct function of police professionalization is the knowledge of, and adherence to the law by the police. In this context, the IACP, in July of 1970, established the IACP Police Legal Center in conjunction with the Police Legal Advisor Program of Northwestern University Law School. One of the purposes of the Police Legal Center is to make information concerning developments in the criminal law available to

its membership. Thus, the IACP has a direct interest in this area of police professionalization, while at the same time it offers to the Court its expertise in practical police problems.

4. Americans for Effective Law Enforcement, Inc. (AELE) represents the concern of the average citizen with the problems of crime and with police effectiveness. AELE is a not-for-profit, non-political, non-partisan organization incorporated under the laws of Illinois with chapters in Colorado, Oregon and Oklahoma. Professor Fred E. Inbau of the Northwestern University School of Law is the national president. AELE has appeared before this Court as Amicus Curiae in the case of *Terry v. Ohio*, 392 U.S. 1.

5. The Law Enforcement Legal Unit, Inc. (LELU), is a non-political, not-for-profit national association of Police Legal Advisors which has recently been determined to be tax exempt. Police Legal Advisors, are attorneys, (in many cases they are also policemen), who serve as house counsel to police departments, rendering advice to the officers as to the proper procedures to be followed in such areas as arrest, search and seizure, interrogations and other aspects of the criminal law. There are currently 68 Police Legal Advisors working in 42 law enforcement agecnies in this country. Police Legal Advisors are concerned with interpreting the decisions of this Court to the police, often in an on-the-street situation, in order that the police may act with maximum effectiveness consistent with such decisions.

Thus, Amicus Curiae represents a line police department, a chief state legal officer, professional organizations of police chiefs and police attorneys, and citizens concerned with the effectiveness of law enforcement. The interest of these parties lies in presenting to the Court a police viewpoint taken in a practical rather than a theoretical context. We seek to articulate the very real problems that confront

the police in critical areas of the law, in order that this Court may weigh these problems in deciding cases which will have a vital impact on the effectiveness of the police.

The approach taken herein, a direct articulation of a police perspective to this Court by the police themselves, or by spokesmen for the police, has rarely been taken before.[1] It is highly necessary that it be taken. As has been stated by a distinguished federal jurist:

> [the courts] must decide the particular case before them, and they must decide it *without any knowledge* of police requirements, with little understanding of how the protection of individual rights may be affected, *and surely with no information about the far reaching effect their decision may have on law enforcement generally, and the havoc their dicta may cause.*[2] (emphasis added)

It is this "gap" of knowledge and information of police requirements that we seek to fill. Amicus Curiae feels strongly that the police have too long been silent when cases of vital significance have come before this Court; the Court has a right to know the police side of such cases, and the police have a duty to articulate their views. This brief will attempt to accomplish this.

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[1]The police viewpoint was presented to this Court in an Amicus Curiae brief filed by Americans for Effective Law Enforcement in the case of **Terry v. Ohio**, 392 U.S. 1 (1968), and in an Amicus Curiae brief filed by the Colorado Attorney General and the Denver Police Department in support of the California Attorney General's Petition for Rehearing in the case of **Chimel v. California**, 395 U.S. 752, (1969).

[2]Chief Judge J. Edward Lumbard of the Second Circuit Court of Appeals in "New Standards for Criminal Justice," appearing in the May 1966 issue of the Journal of the American Bar Association, page 432.

SUMMARY OF ARGUMENT

Amicus Curiae supports the position taken by respondent's brief on original argument in the instant case as to all of the questions presented therein. This brief, however, deals with only one of the issues in the instant case, respondent's contention that the warrantless search of petitioner's apartment was reasonable, even when judged by the standards of *Chimel v. California,* 395 U.S. 752. Respondent bases this contention on the fact that in the instant case the "exigencies of the situation" made it "reasonably impracticable" for the police to procure a search warrant before going to petitioner's apartment to arrest him. (Respondent's brief on original argument, pages 34 through 39.) The circumstances in the instant case which are claimed to have created thhis exigency include: the unavailability of an issuing magistrate; the fear that the arrest of two of Hill's confederates in the commission of a robbery would alert him that the police were seeking him; and, the necessity to arrest Hill before he could perpetrate other crimes. Respondent cites language from prior decisions of this Court, *Trupiano v. United States,* 334 U.S. 699, *McDonald v. United States,* 335 U.S. 451, and *Terry v. Ohio* 392, U.S. 1, language cited with approval in *Chimel v. California,* supra, as authority for the position that a search may be reasonable, even though made without warrant, if, under the circumstances, it was reasonably impracticable to procure a search warrant. (Respondent's brief pages 34 through 36.)

Amicus Curiae, using respondent's contention with regard to the instant case as a point of departure, urges the Court to examine the broader question of exigent circumstances as applied to police work generally. This issue is of critical importance to the police in view of *Chimel v. Cali-*

fornia, supra, which drastically reduced the permissible scope of a search of premises incident to a lawful arrest.

The holding in Chimel is apparently based in large measure on the fact that, in that case, it was clearly practicable to procure a search warrant prior to Chimel's arrest. This Court's recent holding in *Vale v. Louisiana,*——U.S. ——, 7 CrL 3130, June 22, 1970, reinforces the proposition that the practicability of procuring a search warrant prior to the arrest of the suspect in each case was the reason that the arrest-based searches in *Chimel* and *Vale* were found to be unlawful. If this construction of the *Chimel-Vale* rationale is correct, Amicus Curiae is in complete agreement. For both legal and practical reasons the police should, *whenever practicable,* procure search warrants before making searches.

The problem for today's policeman lies in the fact that, in many cases, it really is impracticable to procure a search warrant prior to making an arrest; he needs to know *when* a warrantless search will be permissible. The problem arises in cases in which an officer reasonably believes that a delay in making an arrest, while a search warrant is being procured for the premises on which the arrest will take place, may result in the escape of a suspect, the destruction or disposal of evidence, or increased danger to the officer or third persons. If he waits for a search warrant the object of the search may be frustrated; yet, if he proceeds without a search warrant, he may be second-guessed by a reviewing court as to his determination that an exigency actually existed.

Guidelines are needed to clarify for the police the circumstances under which the exigencies of the situation will justify a warrantless search. Six examples of practical police problems are presented in this brief in order to

demonstrate to the Court the need for realistic guidelines for the police in this area.

Two of these cases, homicide cases, illustrate the necessity for the police to make prompt arrests of persons wanted for crimes of violence; but in each case described, the prompt arrest alerted persons on the premises, other than the arrestee, to dispose of evidence against the arrestee during the period in which the police, adhering to *Chimel's* mandate, were securing a search warrant.

Another of the cases described deals with an arrest situation in which officers, again mindful of *Chimel's* limitations on arrest-based searches, did not search the arrestee's house. A sister of the arrestee went into another room and an officer followed her in time to seize a fully loaded pistol from the top of the dresser in that room. This case illustrates the fact that weapons in a room, other than that in which the arrest takes place, can constitute a real danger to an officer, yet *Chimel* offers no guidelines for dealing with this problem.

Two of the described cases illustrate how a judge's rigid adherence to the search warrant requirement can second-guess officers despite the exigencies of the situation. In one case, narcotics were being consumed in the officer's sight, yet his warrantless entry and search was subsequently ruled unlawful because no search warrant was secured. In the other case, weapons seized from an automobile during the height of a riot, where every officer was needed on the street, were suppressed because no search warrant was used. In the final case the unavailability of an issuing magistrate is discussed in light of *Chimel*.

These cases are presented in order to document the *need* for guidelines; Amicus Curiae then offers suggested guidelines for the Courts consideration. The guidelines

basically seek to clarify and define those "exigent circumstances" which make it "reasonably impracticable" to procure a search warrant: danger to the officer or to others, destruction or disposal of evidence, flight or escape of a suspect, the unavailability of an issuing magistrate, and other exigencies such as a riot situation. In any case in which an officer seeks to justify a warrantless search of premises he would, under the suggested guidelines, have to present to a reviewing court *facts* which prove *both* probable cause to search and the existence of the exigency which made it impracticable for him to procure a search warrant.

Thus, under the suggested guidelines, we do not urge an unfettered discretion in the officer; the reviewing court is still the final arbiter. Nor do we urge a drastic departure from *Chimel;* rather we ask a realistic appraisal by this Court of the fact that in some cases, limited to real exigencies, the necessity for prompt police action should be recognized and clear rules laid down to guide the police in such cases. Authority for the principles expressed in the suggested guidelines is found in decisions both of this Court and in the Federal Circuits.

Amicus Curiae has attempted in this brief to articulate to the Court a factual police viewpoint. We urge the Court to sustain the warrantless search of petitioner's apartment as made under exigent circumstances and to consider the need of the police for realistic guidelines in this area.

ARGUMENT

1. *The Importance of The Instant Case to the Police*

This is a search and seizure case. Of all of the areas of the law which confront the police in their day-to-day activities, search and seizure may well be the most critical. This Court has made it clear that there is a preference for the use of physical evidence against an accused, as opposed to testimonial evidence elicited from the accused himself. *Miranda v. Arizona,* 384 U.S. 436, *Orozco v. Texas,* 394 U.S. 324. Search and seizure is one of the primary means available to the police in their quest for physical evidence; while, at the same time, today's police officer is well aware that if he oversteps the bounds of the Fourth Amendment's proscription against unreasonable searches and seizures, as interpreted by the courts, evidence thus gathered will be inadmissible. *Mapp v. Ohio,* 367 U.S. 643.

Thus, the law of search and seizure is of paramount importance to the working policeman. Justice Tom C. Clark, in one of the most empathetic statements concerning the police ever to emanate from this Court, summed up the police officer's position:

> Every moment of exery day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. *Chapman v. United States,* 316 U.S. 610 at 622, (dissenting opinion).

The instant case is of particular importance to law enforcement because it deals with the issue of the per-

missible scope of a search of premises incident to a lawful arrest. In view of the substantial restrictions on such searches announced by this Court in *Chimel v. California,* 395 U.S. 752, (1969), this area of the law of search and seizure has assumed critical importance for the police. One of the most pressing problems for the police officer on the street is the situation in which exigent circumstances make it reasonably impracticable for him to procure a search warrant, yet prompt police action is called for. There is little or nothing by way of guidelines for proper police action in this area. We urge the Court to examine the question of exigent circumstances and to establish realistic guidelines for the police in this area.

The question of exigent circumstances in the instant case is presented by respondent's contention that the warrantless search of petitioner's apartment was reasonable even when measured by the standard of *Chimel v. California,* supra, because, in the instant case, it was reasonably impracticable for the police to procure a search warrant. (Respondent's brief on original argument, pages 34 through 40.) In this brief, Amicus Curiae addresses itself solely to the exigent circumstances issue, both in the context of the instant case,[3] and in the broader context of the impact of *Chimel v. California,* supra, on police work generally, in those situations in which exigent circumstances dictate rapid police action.

The facts of the instant case have been set forth in detail in respondent's brief (pages 4 through 15). We will

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[3]Respondent's brief on original argument also contends that the arrest of one Miller, whom the police mistakenly believed was petitioner Hill was lawful, (page 19); that the search of petitioner's apartment was reasonable under **pre-Chimel** standards (page 27); and that the new rule announced in **Chimel** should be applied prospectively only (page 40). Amicus Curiae is in complete agreement with, and expresses total support for, respondent's position on each of these questions; however, this brief will confine itself to the question of exigent circumstances under a post-**Chimel** standard.

only briefly summarize them here, as they apply to the issues presented in this brief.

Los Angeles police officers were investigating a vicious robbery and aggravated assault perpetrated by four men. Two of the suspects, Baum and Bader, were arrested two days after the robbery; they advised the police where a third suspect, (Hill) lived, and they further advised the police that proceeds of the robbery and weapons used in the robbery were at Hill's apartment. Within hours of receiving this information, the police proceeded to the apartment named, arrested one Miller (whom they believed to be Hill) in the apartment, and searched the apartment incident to that arrest. This search, made without warrant, produced weapons, part of the proceeds of the robbery and other evidence admitted against petitioner at his trial for the robbery. The reasons given by the police for not procuring a search warrant prior to the arrest were:

—1— The information concerning Hill's apartment was received after court hours and the police would have had to wait at least twelve hours before a search warrant could be procured.

—2— Hill and the fourth suspect, Baca were still at large and could well be engaging in other assaults and robberies.

—3— The arrests of Baum and Bader might become known to Hill and alert him to flee or to dispose of evidence.

—4— To arrest Hill but to delay a search of the apartment until a warrant could be procured might alert the fourth suspect Baca, and permit him to dispose of evidence in the apartment, to which he presumably had access.[4]

[4]A point not raised in respondent's brief, but one which offers further justification for the prompt search of Hill's apartment is that in so searching the police might well have found information as to where Baca, the fourth suspect, might be found.

These facts, respondent contends, created a situation whereby:

> it was not 'reasonably practicable' that a search warrant be obtained, and the 'exigencies of the situation' made it imperative that petitioner be arrested forthwith and his apartment searched incident thereto and without delay. (Respondent's brief page 39).

Respondent's brief, pages 36 through 39, cites as authority for this contention prior statements of this Court that search warrants must be procured "wherever reasonably practicable," *Trupiano v. United States,* 334 U.S. 699, *Terry v. Ohio,* 392 U.S. 1; and that in cases where it is reasonably impracticable to procure a search warrant, and in which probable cause to search exists, a warrantless search may be reasonable, *Chimel v. California,* supra, dissenting opinion. We will not reiterate these arguments at this point, but rather turn from the question of exigent circumstances, as illustrated by the instant case, to the broader question of exigent circumstances as applied to police work generally.

2. *The Problem In Perspective—The Impact of Chimel v. California Applied on The Street*

Chimel v. California, supra, drastically reduced the permissible scope of an arrest-based search of the premises upon which an arrest had taken place. Prior to *Chimel* the law was reasonably settled that an officer who had made a lawful arrest in a house, apartment or building could make a search of that part of the premises that was under the arrestee's control. It was not considered material whether or not it was practicable to procure a search warrant prior to the arrest. *Harris v. United States,* 331 U.S. 145, *United States v. Rabinowitz,* 339 U.S. 56. *Chimel*

changed all of this. In that case this Court narrowed the permissible scope of an arrest-based, warrantless search of premises to that area from which the arrestee might secure weapons or destructible evidence.

In *Chimel* itself, officers procured a warrant for Chimel's arrest in the morning but did not arrest him until the late afternoon of the same day. This court held that the warrantless search of Chimel's entire house incident to this arrest was unreasonable under the Fourth Amendment and reversed his conviction, 395 U.S. 752. It is apparent from the facts of the case that it was reasonably practicable for the police to procure a search warrant prior to Chimel's arrest,[5] and it would appear that this was a major factor, if not the determinative factor, in the Court's decision.

Statements from other opinions of this Court, quoted with approval in the majority opinion in *Chimel*, support the view that the practicability of procuring a search warrant prior to the arrest was an essential element in that decision. The *Chimel* majority opinion, at page 758, quoted from *Trupiano v. United States*, supra:

> It is a cardinal rule that in seizing goods and articles, law enforcement agents must secure and use search warrants *whenever reasonably practicable* . . . (emphasis added).

Again, the Chimel opinion, at page 762, cited the following from *Terry v. Ohio*, supra:

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[5]In fact, respondent's brief at page 36 points out that Chimel was considered a prime suspect by the officers for some **weeks** prior to his arrest.

> . . . the police must *whenever practicable* obtain advance judicial approval of searches and seizures through the warrant procedure . . . (emphasis added).

Further, on the same point, Mr. Justice White, in his dissenting opinion in *Chimel* noted, at page 733:

> The Court has always held, and does not today deny, that when there is probable cause to search and it is 'impracticable' for one reason or another to get a search warrant, then a warrantless search may be reasonable.

Finally, this Court's most recent decision in the area of warrantless searches of premises, *Vale v. Louisiana,* ... U.S. ..., 7 Cr L 3130, (June 22, 1970), reinforces the proposition that the practicability of procuring a search warrant prior to an arrest is the critical factor in the search-incident-to-arrest area as defined by *Chimel.* In *Vale,* officers had procured warrants for Vale's arrest. They proceeded to his house and observed him make a sale of narcotics in front of his house. They arrested him outside of his house, then entered and made a warrantless search of the house. In finding this search unreasonable, the Court noted:

> The officers were able to procure two warrants for appellant's arrest . . . They also had information that he was residing at the address where they found him. There is thus no reason, so far as anything before us appears to suppose *that it was impracticable for them to procure a search warrant as well.* 7 Cr L 3131. (emphasis added).

From the foregoing it appears that *Chimel,* as reinforced by *Vale,* stands for the premise that a warrantless search of premises, incident to an arrest but extending

beyond the "immediate area" of the arrestee, will be held unreasonable if it had been practicable for the police to procure a search warrant before the arrest was made. If this construction of the *Chimel-Vale* rationale is correct, Amicus Curiae, is in complete agreement with the principle expressed.

Police officers *should* make searches with warrants whenever it is reasonably practicable to do so.[6] This is not only a legal requirement but from a purely practical point of view, an officer is in a much firmer position, as far as any civil liability might be concerned, if he makes a search armed with a command from a court to do so (i.e. a search warrant), rather than when he is acting on his own.

Thus, from both a legal and a practical viewpoint it is unquestioned that officers should conduct searches with warrants whenever reasonably practicable. The problem for the policeman lies in the words "whenever reasonably practicable." *When* is it reasonably impracticable to procure a search warrant; or, phrased another way, what circumstances, arising out of the exigencies of the situation, will make it reasonably impracticable to procure a search

[6]The following figures indicate the extent to which the Denver Police Department has attempted to comply with **Chimel's** mandate. The figures indicate the number of search warrants secured by the Denver Police in 1968, 1969 and the first half of 1970. Broken down by months these figures indicate a dramatic increase in the number of search warrants after June of 1969, the month in which **Chimel** was decided. (Source: Denver District Court Records)

SEARCH WARRANTS ISSUED TO DENVER POLICE OFFICERS

MONTH	1968	1969	1970
Jan.	19	32	75
Feb.	26	22	31
Mar.	13	32	57
Apr.	19	26	82
May	24	29	70
June	28	Chimel 20	68
July	18	37	
Aug.	19	41	
Sept.	16	46	
Oct.	12	41	
Nov.	14	48	
Dec.	26	47	
TOTAL	234	421	383

warrant so that a warrantless search may properly be made? The answer to this question must, of course, be based on the facts of each case; yet the policeman of today —a policeman who, as Mr. Justice Clark has noted, " . . . is anxious to obey the rules that circumscribe his conduct . . . "[7]—has very little by way of guidelines to aid him in answering this question when he is confronted with it on the street.

In many cases, of course, it is crystal clear that it is reasonably practicable for the police to procure a search warrant prior to making an arrest. Thus, in *McDonald v. United States,* 334 U.S. 699, and in *Trupiano v. United States,* supra, officers had had the parties to be arrested under surveillance for weeks. In cases such as these there is no excuse for not procuring a search warrant. In many other cases, however, the practicability of procuring a search warrant is not so clear. The enforcement of the criminal law is not a static or structured thing. The situations which confront police officers in their day to day activities, particularly in the area of search and seizure, often arise without notice, on the spur of the moment, and in circumstances so varied and unforeseeable that it defies the imagination to predict all of the possibilities that might arise. Thus, at any time, an officer may be faced with a situation which requires him to make a decision on the spot whether to enter a given premises and make an arrest at once, or to delay his action until a search warrant can be procured. This is often an extremely difficult decision to make, for he may reasonably believe that if he delays until a search warrant is obtained he may be increasing the danger to himself or to others, or that the delay may well frustrate the object of his search by permitting a suspect to escape or evidence to be disposed of.

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[7]supra, page 9, **Chapman v. United States,** dissenting opinion.

Due to the fact that the problem just described almost invariably arises in the context of an arrest, it was not until this Court decided *Chimel v. California,* supra, that the problem achieved such momentous proportions for the police. Prior to *Chimel,* an officer who felt that he should proceed at once to make an arrest in a given house, apartment, or other building would have been permitted to search that part of the premises under the arrestee's control for contraband, weapons, or evidence related to the arrest. The problems of escape of suspects or disposition of evidence while a search warrant was being procured did not arise, because a search warrant was unnecessary, assuming that the arrest was lawful and the search was otherwise reasonable. *United States v. Rabinowitz,* supra.

Since *Chimel* has been decided this is no longer the case; arrest-based searches of premises are now barred in most cases, so that the officer is often faced with a real dilemma. The officer is on the scene and has the available facts before him. In his best judgment, based on these facts, there may really exist the type of exigency which makes it impracticable for him to procure a search warrant before making an arrest—e.g. the likelihood of danger to himself or to others, the likelihood of the escape of a suspect, or the likelihood of disposal of evidence; yet, if he acts, he runs a very real chance of being "second guessed" by a judge who, in reviewing the officer's on-scene evaluation of the facts, finds that a search warrant should have been secured. In short, the officer needs guidelines as to how to conduct himself in these situations.

It is from this point of departure that we ask the Court to consider some actual cases in which the police have been faced with a situation involving an exigency of some sort. We further request the Court to view these situations realistically and to empathize with the officers faced with

the decision in each case. We cannot ask the Court to go out on the street with the police; we can, however, attempt to bring "the street"—the gut problems of police work—to the Court, and we can hope that these problems will be viewed with understanding.

3. *Specifics—Actual Cases Showing the Problems That Arise "On The Street"*

The following cases illustrate the manner in which unforeseeable circumstances can create an exigency of one kind or another which makes it reasonably impracticable to procure a search warrant, yet in which immediate action by the police is, or reasonably appears to be, necessary.

CASE NUMBER 1: HOMICIDE—DENVER, COLORADO

This post-*Chimel* case involved the murder of a bartender by two young men. The murder weapon was a .22 caliber automatic pistol. Witnesses to the killing described the assailants and their car. Several days later detectives learned that on the night of the murder, uniformed officers had stopped a car similar to that used by the killers and had taken the names and addresses of A and B, the occupants of the car. Photographs of A and B were shown to the witnesses who tentatively identified them as the killers. This investigation was completed by July 12, and on that date, a pick-up for homicide for A and B was placed in the Denver Police Daily Bulletin. On the afternoon of July 12, officers went to A's house. They were told by A's mother that he was not home; after being apprised of the seriousness of the offense, however, A's mother produced him. A told the officers that B was staying at B's mother's house,[8] and A agreed to take the officers to this house. When the officers arrived at B's mother's house, B's mother said that he

[8]This was not the address given by B when he was stopped by uniformed officers on the night of the killing.

was not there; however, an officer who had gone to the side door arrested B in the doorway as he was attempting to escape. The officers were aware of *Chimel,* thus, no search was made of the room occupied by B or of any part of his mother's house. A and B were taken to police headquarters and placed in line-ups. A was not identified, but B was positively identified by several witnesses as being one of the killers. Under the Colorado Rules of Criminal Procedure, in effect at the time, an affidavit for a search warrant to be executed at night had to contain a *positive* statement that the property sought was on the premises to be searched.[9] By the time that the line-ups for A and B were completed, night had fallen. No search warrant could issue for B's mother's house until the next day, because the officers were not positive that any evidence was located there.

The next morning officers secured a search warrant for B's mother's house, seeking a .22 caliber automatic pistol and the clothing worn by B on the night of the murder. When the officers arrived at B's mother's house with the search warrant, B's mother, B's younger brother, and a neighbor lady were present. No weapons were found; but after she was satisfied that only an *automatic* pistol was being sought, B's mother nodded to the neighbor lady who left and returned with a .22 caliber *revolver* that B's mother had given her "for safekeeping" the night before. This weapon was not the murder weapon. In this case the officers simply do not know whether or not B's mother got rid of the murder weapon in the overnight period before a search warrant could be procured. Certainly she got rid of the revolver until she learned that a revolver could not have been the murder weapon, and it is highly likely that *if* the automatic had been on the premises, she would have removed that also.

[9]This was changed on October 1, 1970. Now Colorado Rules of Criminal Procedure Rule 41 specify that a search warrant based on probable cause may be served at any time.

CASE NUMER 2: HOMICIDE—DENVER, COLORADO

X, Y, and X's girl friend, Z, along with several others, "crashed" a party at a private home in the early morning of August 17, 1969. They were told to leave and, in leaving, they exchanged words with other guests at the party. X, Y, and Z went to X's car nearby and got a rifle out of the trunk. A group of the party guests were standing outside of the house and a shot was fired at X's car, whereupon someone in X's car fired eight shots into the crowd, killing the victim.

Detectives were assigned to investigate and, on the morning of August 17th, questioned witnesses who identified photographs of Y as being in the group who crashed the party. At 11:00 A.M. on the 17th, Y was arrested at his home by uniformed officers. Y told the officers that X had done the shooting and that X and Y had taken the rifle into X's house. Y further told the officers that Z, X's girlfriend, another suspect in the shooting, was living with X. Y agreed to take the officers to X's house. As the officers approached, X apparently tried to escape by running out of the back door, but, he was arrested as he ran around the house. Officers entered the house and arrested Z inside of the house. A search of Z's immediate area revealed no weapons. No further search was made. Approximately ten persons were in the house at the time, including X's brother, who became abusive and ordered the officers out of the house. The officers left and called the detectives who procured a search warrant to search the house for the rifle. It took approximately an hour and a half to draft the warrant and find a judge to sign it. During this period, the officers remained outside of the house; but they did not stop or search any persons leaving the house. When the house was

searched pursuant to the warrant, the rifle was gone.

THE DEFENDANT, X, TOLD THE POLICE THAT WHEN HE WAS ARRESTED, THE RIFLE HAD BEEN IN THE HOUSE. The conclusion is inescapable; while the police waited for the search warrant, one of X's friends removed the murder weapon. A pre-*Chimel* search for the weapon incident to Z's arrest in the house would doubtless have located the weapon; but, the officers, fearing that the *Chimel* rule would make the weapon inadmissible if a warrantless search was made, were forced to take no action to secure this vital evidence until it was too late.

COMMENT:

These two strikingly similar cases illustrate an all-too-common situation that arises on the street. In both cases officers learned where persons wanted for murders were to be found. In both cases, one suspect had been arrested and the likelihood existed that the news of the first arrests would be rapidly relayed to the second suspects enabling them to escape or to dispose of evidence.[10] Further, any realistic evaluation of police work must take into consideration the fact that when the police learn where they can locate persons wanted for murder, or other crimes of violence, delay in the arrest of such persons is not a luxury that either the police or society can afford. There is an overriding duty to the public to take suspects into custody, *and to seize their weapons,* before they perpetrate further crimes.[11]

Thus, the police can not, and should not, delay making arrests in cases such as the two Denver homicide cases or the instant case.

But, once the police enter the premises to make the arrest they have alerted any other persons on the premises to the fact of the arrest. The two Denver cases show clearly

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[10]This was also the situation in the instant case. The police were afraid that the arrests of Baum and Bader would alert petitioner Hill. Supra page 11.

that friends or relatives of the arrestee *will,* in fact, make every effort to dispose of evidence against the arrestee. The question then arises as to just how the police, who have made an arrest on a given premises, can go about preventing the destruction or disposal of evidence by persons remaining on the premises. The authority to detain persons on the premises, persons for whom there is no probable cause for arrest, is questionable at best. As a matter of fact, in his dissenting opinion in *Chimel,* footnote 12, Mr. Justice White suggested that if the officers in that case had remained on the premises and followed Chimel's wife about:

> the invasion of her privacy would have been almost as great as the accompanying search. Moreover, had the wife summoned an accomplice one officer could not have watched them both.

It is one thing to talk glibly about "securing" premises to prevent disposal of evidence by persons thereon; it is quite another to deal with the legal and practical realities of this situation.[12]

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[11]One unfamiliar with police work might suggest that the police merely place the suspect premises under surveillance until a search warrant could be procured. This would be unrealistic in many cases for the following reasons:

—If the suspect was notified of the first arrest by telephone he would have an opportunity to dispose of any evidence on the premises despite the fact that the police had the house under surveillance.

—In some neighborhoods surveillance would be literally impossible in that any type of police activity would be immediately noticed by the residents, the word would be passed that the police were present; and this information would likely reach the suspect.

—In built up urban areas especially, a surveillance of the outside of premises can not guarantee that the suspect could not escape via a window or an exit not visible from any surveillance point.

[12]The Denver Police officers in the second homicide case were asked why they did not stop or search persons coming out of the house. All replied that they did not do so for fear of civil suits in false arrest or assault and battery. It is arguable that a person leaving the premises in such a case could be "frisked" for weapons under the rationale of **Terry v. Ohio,** 392 U.S. 1 (1968). That case, however, dealt clearly with a pat down to protect the officer, rather than with a search for evidence.

In each of the Denver homicide cases described, the police, faced with the highly restrictive language of *Chimel,* elected the "safe" course and procured search warrants for the murder weapons. In the first case it is possible, and in the second case it is definitely established, that this election cost them the murder weapons. In these cases the police, in their eagerness to comply with *Chimel,* "second-guessed" themselves. The point is that they should not have had to *guess* at all. Clear cut guidelines realistically defining exigent circumstances in cases such as these might well have prevented the loss of this vital evidence.[13]

CASE NUMBER 3: NARCOTICS, DADE COUNTY, FLORIDA

The following is an account of a case furnished by Mr. Howard Levine, Police Legal Advisor, Dade County Department of Public Safety, Dade County, Florida.

On October 18, 1969 at approximately 2:40 A.M. in an area of unincorporated Dade County, Florida, in which rapes of white females had occurred on the previous Friday night, a police officer was accompanying a lone white female to her house. As he crossed the back yard of an apartment building with her, he had occasion to look into a ground floor apartment in the building. He observed four white males smoking homemade-type cigarettes in the man-

[13]These two cases were presented once before to this Court in the Amicus Curiae brief of the Colorado Attorney General and the Denver Police Department in support of the California Attorney General's Petition for Rehearing in **Chimel v. California.** On October 13, 1969, this Court denied rehearing without opinion, 24 L. Ed. 2d 124. It should be noted that convictions have been obtained in both cases; in the first case by a guilty verdict, (People v. Moreno, Denver Police Dept. No. 355273) and in the second by a guilty plea (People v. Clements, Denver Police Dept. No. 362311). In each case the conviction resulted because there were numerous eyewitnesses to the killings. The facts of the convictions are immaterial as regards the point of the cases that **Chimel** kept the police from obtaining the murder weapon. If all homicides were committed in front of witnesses their solution would be relatively simple; unfortunately, this is not the case. In most homicide cases the murder weapon is a vital item of evidence, yet the above cases and other cases show how a case such as **Chimel** can create a Constitutional "zone of immunity" around such weapons.

ner characteristic of the marijuana smoker. Also, a fifth white male was injecting a substance into the arm of a Negro male. In addition, the police officer, who had been trained in narcotics, smelled the distinctive odor of marijuana coming through an open fan vent measuring approximately three feet by three feet.

Based on this information, the Dade County Police Legal Advisor authorized the officer to enter the premises pursuant to the emergency doctrine and on the separate theories that both a felony was being committed in the officer's presence, and that the officer had reasonable grounds to believe that the evidence of that felony was being destroyed. Obtaining a search warrant would have been impractical.

After the officers had entered and secured the premises and had properly advised all of the subjects of their Constitutional rights, each of the subjects individually admitted to possessing and smoking marijuana.

On November 25, 1969, a judge of the Criminal Court of Record of Dade County ordered the evidence suppressed on the grounds that the officers had failed to obtain a search warrant.

COMMENT: This is a case in which the exigency, the known consumption of evidence, would have made even a minimal delay to procure a search warrant clearly impracticable; yet a judge suppressed the evidence because no warrant was secured. This is a classic example of judicial "second guessing," not only of the police officer but of a Police Legal Advisor[14] to whom the officer had turned for advice. Cases such as this appear to penalize an officer's alertness and initiative in the performance of his duties. Guidelines from this Court are clearly necessary in light of such rulings.

CASE NUMBER 4: DANGER TO THE OFFICER, DADE COUNTY, FLORIDA

The following case was described by Mr. James Jorgenson, Police Legal Advisor, Dade County Department of Public Safety, Dade County, Florida.

This case involved a post-*Chimel* arrest of a narcotics peddler in his home. The arrestee's mother and sister were also present. No search of the house was made. The sister stated that she had to go to the bathroom and left the room. Fortunately, an alert officer followed her in time to seize a fully loaded 9 mm automatic pistol from the top of a dresser in a bedroom which the sister had entered. The Dade County officers, of course, cannot be sure whether the sister would have taken up the gun or not; the point is that the gun was there, and the officers, restricting themselves to searching the immediate area of the arrestee, did not secure the gun until the sister entered the room in which the weapon was located.

COMMENT: This case illustrates the fact that, on occasion, the fact of danger, or potential danger, to an officer can create an exigency of its own. This Court has recognized the fact that weapons in the hands of criminals pose a special danger to officers *on the street.* For instance in *Terry v. Ohio,* supra, at footnote 21, the Court pointed out that 55 of 57 officers killed in 1966 died of gunshot wounds. Yet, a firearm in a house or in an apartment can be as dangerous as a gun in the hands of a criminal on the street. An officer who reasonably believes that there may be weapons on a premises where an arrest has taken place should have some leeway to protect himself; yet the language of *Chimel,* read in its most restrictive terms, grants no such

[14]See above: Interest of the Amicus Curiae, Law Enforcement Legal Unit, Inc. page 3, relative to Police Legal Advisors and their functions.

leeway at all. The need for guidelines on this issue is obvious.

CASE NUMBER 5: RIOT, WASHINGTON, D.C.

A riot or civil disorder in which an entire police department is committed to the street can create an exigency of its own. Every man is needed, and time is of the essence in searches for snipers, looters, arsonists, and other violators; and it is particularly necessary to make searches for weapons or explosives as expeditiously as possible. Yet, consider the holding of the District of Columbia Appeals Court in *Leven v. United States*, D. C. Appeals, 6 Cr L 2352 January 15, 1970. That case arose during the April 1968 riots in Washington, D. C. District police officers observed Leven driving about the city in violation of the curfew, in a truck with a shotgun prominently displayed in the cab. The officers told Leven to drive to the police station while they followed him. At the station Leven parked the truck and went inside. One of the officers, who had observed Leven place something under the front seat of the truck before he went into the police station, looked under the front seat and seized two revolvers which were concealed there. The majority of the D.C. Appeals Court ruled that the revolvers should be suppressed because no search warrant for the truck was secured.

COMMENT: Granted that this case involved automobiles rather than premises, there is no reason to believe that a warrantless seizure of weapons from premises would have been treated differently by the majority of the court that ruled in *Leven*. This rigid requirement of a search warrant, and the apparent disregard for the realities of police work in a riot situation evidenced by the majority of the court prompted Chief Judge Hood, dissenting in *Leven*, to state:

> Under the circumstances, I think it most unreasonable and unrealistic to say that the officer, at a time when there was a great shortage of police manpower, should have gone across town seeking a search warrant. 6 Cr L 2353

CASE NUMBER 6: UNAVAILABILITY OF AN ISSUING MAGISTRATE[15]

There are still parts of this country in which a magistrate may simply not be available. This can create an exigency in cases in which there is a pressing need to procure a search warrant. Aspen, Colorado is one example. This mountain ski resort town has one county judge available to issue warrants. When this judge is unavailable the next nearest magistrate is a two hour drive away at Glenwood Springs. During snow storms, however, the roads in that part of the country may be completely impassable; in these cases, if the Aspen judge should be out of town, it would be literally impossible to procure a search warrant; yet the *Chimel* opinion makes no reference to such a situation. Guidelines are clearly needed here.

The foregoing cases have been but a few examples of the practical police problems involved in the area of exigent circumstances. An article appearing in the Notre Dame Lawyer, June 1970, Vol. 45, page 559, entitled "*Chimel v. California*—A Police Response" contains a further, more extensive, enumeration of the ways in which *Chimel* has confronted the police with problems, particularly in the

[15]This example is based on information from Mr. Michael Fitzgerald, Deputy District Attorney, Aspen, Colorado, and on the writer's personal knowledge from consulting with Mr. Fitzgerald on this problem.

area of exigent circumstances and the impracticability of procuring a search warrant.[16]

This section of this brief has attempted to demonstrate specific police problems in a specific area. Common to each of these problems is the lack of guidelines for the police to follow when dealing with such problems. We turn now to our request that the Court establish such guidelines.

4. This Court Is Urged To Establish Realistic Guidelines For The Police In The Exigent Circumstances Area

We ask this Court to provide guidelines for the police, guidelines which will enable them to act properly in their decision-making process, as to when a search warrant must be procured. Justice Clark, supra page nine, has posited the duty of this Court to ". . . lay down those rules with such clarity and understanding that (the policeman) may be able to follow them." The cases presented above indicate the need for guidelines; we urge the Court to provide them.

The cases described above also demonstrate the need for a *realistic* appraisal of the exigent circumstances area. In this context we respectfully offer for the Court's consideration the following suggested guidelines:

1. When a search of premises incident to a lawful arrest extends in scope beyond the immediate area of the person arrested, items seized beyond that scope will ordinarily be inadmissible. *Chimel v. California,* supra.

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[16]The writer of this brief is the author of the law review article cited. The article is cited as informational as to the cases discussed, and not as authority for any of the conclusions contained therein.

2. However, if the state, at a motion to suppress such evidence can show and the reviewing court shall find as a fact, that prior to the arrest:

a) it was reasonably impracticable for the police to procure a search warrant;

and,

b) probable cause to make the search existed, then evidence so seized shall be admissible.

3. Going one step further, those circumstances which would make it reasonably impracticable to procure a search warrant should be clarified and defined. Such exigent circumstances, we submit, could be shown by *specific and articulable* facts[17] which indicate:

a) The reasonable probability of harm to the officers or to third persons while a search warrant is being procured. (This situation is illustrated by case number 4, page twenty-five, supra, in which a loaded gun was available in a room other than that in which the arrest took place.)

b) The reasonable probability of the flight or escape of a suspect while a search warrant is being procured. (This situation is illustrated by the two Denver homicide cases, cases number 1 and 2, supra, pages eighteen to twenty-one).

c) The reasonable probability of the destruction, concealment, or removal of weapons, contraband, or evidence while a search warrant is being procured. (This situation is illustrated by the Dade County narcotics case, case number 3, supra page twenty-three, and the two Denver

[17]Terry v. Ohio, 392 U.S. 1, page 21, where such facts are required to justify a "stop and frisk."

homicide cases, cases number 1 and 2, supra pages eighteen to twenty-one).

d) The unavailability of an issuing magistrate. (This is illustrated by the description of the Aspen, Colorado situation, case number 6, supra page twenty-eight).

e) Other exigent circumstances which would make the procuring of a search warrant reasonably impracticable. (This situation is illustrated by the Washington, D.C. riot case, *Leven v. United States* case number 5, supra pages twenty-six and twenty-seven).

Guidelines such as those suggested would give to the police officer on the street a knowledge of the limits of his authority to make a warrantless search, while at the same time they would advise him of the situations in which he could properly take action without delaying to procure a search warrant.

The authority for the proposition that exigent circumstances may make it reasonably impracticable to procure a search warrant lies in the prior pronouncements of this Court, cited with approval in *Chimel v. California,* and noted herein supra, pages twenty to twenty-two. In addition to this language concerning the practicability of procuring a search warrant, we cite the following from *Trupiano v. United States,* 344 U.S. 699 at 708:

> A search and seizure without a warrant as an incident to a lawful arrest has always been considered a strictly limited right. *It grows out of the inherent necessities of the situation at the time of the arrest.* (emphasis added).

And from *McDonald v. United States,* 335 U.S. 451 at 456:

> We cannot . . . excuse the absence of a search war-

> rant without a showing . . . that the exigencies of the situation made that course imperative.

The suggested guidelines do no more than make explicit the above quoted propositions, for the suggested guidelines specifically require the state to show the facts that created the exigency which made it reasonably impracticable to procure a search warrant.

Further authority for the guidelines, as suggested, may be found in this Court's language in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294 at 298, (1967):

> The Fourth Amendment does not require police officers to delay in the course of their investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential and only a thorough search of the house for persons or weapons could have insured that Hayden was the only man present and that the police had control of all weapons that could be used against them or to effect an escape.

The Federal Circuit Courts of Appeal have upheld warrantless entry and search in circumstances of exigency. Thus, the probability that a suspect would be alerted by the arrest of others was held to justify a warrantless search in *Williams v. United States,* CA8, 260 F. 2d 125, cert. den. 359 U.S. 918; and the probability of destruction or disposal of evidence has been held sufficient to justify such a search. *Ellison v. United States,* CADC, 206 F. 2nd 476; *United States v. Volkell,* CA 2, 251 F. 2d 333, cert. den. 356 U.S. 962, *United States v. Garnes,* CA2, 258 F. 2d 530, cert. den. 359 U.S. 937.

In April of 1970 an *en banc* Circuit Court of Appeals for the District of Columbia sustained a warrantless entry to search for a suspect in a robbery committed some hours

before. *United States v. Dorman,* CADC, No. 21,736, April 15, 1970. In that case the seizure of a stolen suit which was discovered during the search for the suspect was upheld.

We do not suggest that this Court make a broad retreat from *Chimel.* The figures cited supra page fifteen, footnote 6, showing the large increase in the number of search warrants procured by the Denver Police Department since *Chimel* was decided, indicate that in the majority of cases the search warrant procedure can be followed by the police without impairing their efficiency. We are addressing ourselves to those cases, illustrated by the situations described herein, in which a real exigency exists and a rigid adherence to the search warrant requirement may well frustrate the purpose of the police action.

We submit that the suggested guidelines do not give an unfettered discretion to the police, for the police must justify their decision to act without a warrant to a court reviewing this decision after the fact. In making this justification of their actions, they must not only show facts constituting probable cause, but also facts which created the exigency that made the procuring of the search warrant impracticable, and made their prompt action necessary. Further, nothing in the suggested guidelines would justify a warrantless search resulting from mere inertia or laziness on the part of the officer; nor would the delay in procuring a search warrant *per se* justify a warrantless search, for as Chief Justice Burger, then Judge Burger noted in *Chappell v. United States,* CADC, 342 F. 2d 935 at 938:

> That delay may be encountered, however, is not controling on whether a warrant is required; securing a warrant always involves some additional time.

Under the suggested guidelines the police must show specifically *how* the delay in procuring a warrant made their action necessary.

Thus, we do not ask the Court to permit the policeman to be the final arbiter of the existence of the exigency; we do, however, urge the Court to consider the fact that the policeman is on the scene when the situation which is claimed to create the exigency arises and that the policeman is evaluating the situation as it then appears to him, based on his experience. This Court has held, in the context of on-the-street encounters with persons suspected to be armed, that due weight should be given: "... to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experiences." *Terry v. Ohio,* 392 U.S. 1 at 27. We urge the Court to apply the same standard of review to an officer's reasonable inferences as to whether or not an exigency exists, (e.g. whether a suspect is likely to escape; whether it is likely that evidence will be disposed of; or whether the danger to the officer is likely to be increased), bearing in mind that the court reviewing the policeman's conduct will be the final arbiter.

Finally, we cite *Terry v. Ohio,* supra, as an example of a case in which guidelines were set forth by this Court for the exercise of police discretion in another area. The discretion to stop and "frisk" persons suspected of being involved in criminality and suspected of being armed is a broader discretion than that which is sought for the police by the suggested guidelines in the exigent circumstances area. Yet since June 10, 1968, the date of the *Terry* decision, there has been no evidence of police abuse of the discretion reposed in them by that case. The fact that this Court has not granted certiorari in a single "stop and frisk" type case is a clear indication that the police have used their broadened authority in that area with circumspection and

without abusing the trust evidenced by this Court. We believe that the same attitude would be taken by the police with regard to the suggested guidelines defining exigent circumstances.

CONCLUSION

We ask this Court to reach the question of the reasonableness of the search of petitioner's apartment in light of the new standards set down in *Chimel v. California,* supra, and we ask the Court to sustain the search as reasonable having been made under exigent circumstances which made it reasonably impracticableto procure a search warrant.[18] (Respondent's brief pages 34-39).

We further urge the Court to consider the need of the police for guidelines in this critical area and to consider the cases and suggestions presented herein with a view towards the establishment of such guidelines for proper police activity.

Respectfully submitted,

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[18]If this Court should decide, as we urge it to decide, that **Chimel v. California** is to be applied prospectively only the question of the search of the petitioner's apartment in light of **Chimel** would become moot. **Sibron v. New York** 392 U.S. 40, however stands for the principle that if a question is of sufficient importance the Court will consider it despite mootness. We submit that the need of the police for guidelines in the exigent circumstances area is of sufficient importance for the Court to reach the question.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HILL *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 51. Argued January 19, 1970—Reargued October 21, 1970—Decided April 5, 1971

Two men, who were driving petitioner Hill's car, were arrested for narcotics possession. A search of the car disclosed property stolen in a robbery the previous day. Both men admitted taking part in the robbery and implicated Hill, who shared an apartment with one of them. The guns used in the robbery and other stolen property were reported to be in the apartment. An investigating officer checked official records on Hill, verifying his association with one of the informants, his description, address, and make of car. The police, with probable cause to arrest Hill, but without a search or arrest warrant, went to his apartment, and there found a man matching Hill's description. The arrestee denied that he was Hill (and, in fact, he was not), and denied knowledge of any guns in the apartment, but the police, who spotted a gun and ammunition in plain view, arrested the man, searched the apartment, and seized guns, stolen property, other evidentiary items, and two pages of Hill's diary. Hill was convicted of robbery, substantially on the basis of items seized in the search. The trial judge ruled that the police acted in good faith in believing the arrestee was Hill. The District Court of Appeal agreed that the officers acted in good faith and that the arrest was valid, but thought the search unreasonable. The California Supreme Court reversed, sustaining both the arrest and the search. Hill argues that *Chimel* v. *California*, 395 U. S. 752, narrowing the permissible scope of searches incident to arrest, decided after the affirmance of his conviction by the state courts, should be applied to his case in this Court on direct review. *Held:*

1. *Chimel, supra,* is inapplicable to searches antedating that decision, regardless of whether the case is on direct or collateral review or involves state or federal prisoners. *Williams* v. *United States, ante,* p. —. Pp. 4–5.

Syllabus

2. The arrest and search were valid under the Fourth Amendment, since the police had probable cause to arrest Hill and reasonably believed the arrestee was Hill. Accordingly, they were entitled to do what the law allowed them to do if the arrestee was in fact Hill, that is, to search incident to arrest and to seize evidence of the crime they had probable cause to believe Hill committed. Pp. 5–7.

3. Since Hill's argument that the admission into evidence of pages of his diary violated his Fifth Amendment rights was not raised below, it is not properly before this Court. Pp. 7–8.

69 Cal. 2d 550, 446 P. 2d 521, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, and BLACKMUN, JJ., joined. BLACK, J., concurred in the result. HARLAN, J., filed a concurring and dissenting opinion, in which MARSHALL, J., joined. DOUGLAS, J., took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1970

Archie William Hill, Jr., Petitioner, v. State of California. | On Writ of Certiorari to the Supreme Court of California.

[April 5, 1971]

Mr. Justice White delivered the opinion of the Court.

On June 4, 1966, four armed men robbed a residence in Studio City, California. On June 5, Alfred Baum and Richard Bader were arrested for possession of narcotics; at the time of their arrest, they were driving petitioner Hill's car, and a search of the car produced property stolen in the Studio City robbery the day before. Bader and Baum both admitted taking part in the June 4 robbery, and both implicated Hill. Bader told the police that he was sharing an apartment with Hill at 9311 Sepulveda Boulevard. He also stated that the guns used in the robbery and other stolen property were in the apartment. On June 6, Baum and Bader again told the police that Hill had been involved in the June 4 robbery.

One of the investigating officers then checked official records on Hill, verifying his prior association with Bader, his age and physical description, his address, and the make of his car. The information the officer uncovered corresponded with the general descriptions by the robbery victims and the statements made by Baum and Bader.

Hill concedes that this information gave the police probable cause to arrest him, and the police undertook to do so on June 6. Four officers went to the Sepulveda Boulevard apartment, verified the address, and knocked.

One of the officers testified: "The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and from Baum and Bader, answered the door. . . . We placed him under arrest for robbery."

The police had neither an arrest nor a search warrant. After arresting the man who answered the door, they asked him whether he was Hill and where the guns and stolen goods were. The arrestee replied that he was not Hill, that his name was Miller, that it was Hill's apartment and that he was waiting for Hill. He also claimed that he knew nothing about any stolen property or guns, although the police testified that an automatic pistol and a clip of ammunition were lying in plain view on a coffee table in the living room where the arrest took place. The arrestee then produced identification indicating that he was in fact Miller, but the police were unimpressed and proceeded to search the apartment—living room, bedroom, kitchen area, and bath—for a period which one officer described as "a couple of hours."

During the course of the search, the police seized several items: rent receipts and personal correspondence bearing Hill's name from a dresser drawer in the bedroom; a starter pistol, two switchblade knives, a camera and case stolen in the Studio City robbery, and two hood-masks made from white T-shirts, all from the bedroom; a .22-caliber revolver from under the living room sofa; and two pages of petitioner Hill's diary from a bedroom dresser drawer.[1]

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[1] All of these items, except the rent receipts and correspondence, were later introduced in evidence at the preliminary examination involving Baum, Bader, and Hill. A radio stolen in the Studio City robbery was also introduced, since it was found in Hill's car when Baum and Bader were arrested. Finally, the State introduced two handwriting exemplars executed by petitioner Hill after his arrest. Although the rent receipts and personal correspondence were

On October 20, 1966, Hill was found guilty of robbery on the basis of evidence produced at the preliminary hearing and the trial.[2] Eyewitnesses to the robbery were unable to identify Hill; the only substantial evidence of his guilt consisted of the items seized in the search of his apartment. In sustaining the admissibility of the evidence, the trial judge ruled that the arresting officers had acted in the good-faith belief that Miller was in fact Hill.[3] The District Court of Appeal agreed that

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not introduced in evidence, one of the officers who participated in the arrest and search at the Hill apartment testified that in the same drawer where he found the diary pages "there were rent receipts, numerous stack of rent receipts at this particular apartment, made out to Archie Hill, and there were several other pieces of paper, correspondence, notes from girls, and so forth, all to an Archie or an Archie Hill." No objection was offered to this testimony.

Thereafter, petitioner's case was severed from that of Baum and Bader. Hill waived a jury and submitted the case for trial on the transcript of the preliminary hearing and the exhibits there introduced. The State called one additional witness at trial—Officer Gastaldo—who gave a more complete version of the investigation of the robbery and of the arrest of the man who turned out to be Miller. The two diary pages seized in Hill's apartment contained what was in effect a full confession of his participation in the Studio City robbery. The additional testimony of Officer Gastaldo was critical in establishing the legality of the arrest and subsequent search. After hearing this testimony, the trial judge denied petitioner's motion to suppress the items seized, including of course the diary pages. Hill presented no further evidence at trial, and was found guilty as charged. A motion for a new trial was subsequently denied, and petitioner's appeals in the California courts followed.

In his brief in this Court, petitioner attacks the admission of the diary pages on a ground never advanced below. For the reasons expressed in Part III of this opinion, we do not rule upon these contentions.

[2] See n. 1, *supra*.

[3] The trial judge stated:

". . . I have fully reviewed the evidence. I have determined that the officer in good faith believed that the defendant, or that the person who was arrested—not the defendant in this case—was be-

the officers acted in good faith and that the arrest of Miller was valid but nonetheless thought the incident search of Hill's apartment unreasonable under the Fourth Amendment. 67 Cal. Rptr. 389 (1968).[4] The California Supreme Court in turn reversed, sustaining both the arrest and the search. 69 Cal. 2d 550, 446 P. 2d 521 (1968). We granted certiorari, 396 U. S. 818 (1969), and now affirm the judgment of the California Supreme Court.

I

Petitioner argues that *Chimel* v. *California*, 395 U. S. 752 (1969), decided after his conviction was affirmed by the California Supreme Court, should be applied to his case, which is before us on direct review. *Chimel* narrowed the permissible scope of searches incident to arrest, but in *Williams* v. *United States* and *Elkanich* v. *United States, ante,* p. —, we held *Chimel* inapplicable to searches occurring before the date of decision in that case—regardless of whether a case was still on direct review when *Chimel* was decided, see *Williams, supra,* or whether a *Chimel* challenge was asserted in a subsequent collateral attack on a conviction. See *Elkanich, supra.*

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lieved by the officer in good faith to be Mr. Hill, and that whether or not this document consisting of two pages of the private diary of Mr. Hill should be admitted depends on whether or not at the time of the arrest and the search of the premises, the officer acted in good faith."

[4] Justice Ford stated:

". . . While the doctrine of probable cause assures a balance between the rights of the individual and those of the government with respect to the matter of arrest, the constitutional protection against unreasonable searches, particularly of a person's home, would be less than complete if a plenary search could be justified as incident to an arrest of a person mistakenly believed by the officer to be in immediate charge of the premises. Such a case is not one where the right of privacy must reasonably yield to the right of search." 67 Cal. Rptr., at 391.

We also stated that in light of past decisions there was no difference in constitutional terms between state and federal prisoners insofar as retroactive application to their cases of a new interpretation of the Bill of Rights is concerned. *Ante*, at —. The search of Hill's apartment, permissible in scope under pre-*Chimel* standards, will not be retrospectively invalidated because of that decision.

II

Based on our own examination of the record, we find no reason to disturb either the findings of the California courts that the police had probable cause to arrest Hill and that the arresting officers had a reasonable, good-faith belief that the arrestee Miller was in fact Hill, or the conclusion that "[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." 69 Cal. 2d, at 553, 446 P. 2d, at 523.[5] The police unquestionably had probable cause to arrest Hill; they also had his address and a verified description. The mail box at the indicated address listed Hill as the occupant of the apartment. Upon gaining entry to the apartment, they were confronted with one who fit the description of Hill received from various sources.[6] That person claimed he was Miller, not Hill. But aliases and false identifications are not uncommon.[7]

[5] The California Supreme Court relied on *People* v. *Kitchens*, 46 Cal. 2d 260, 263–264, 294 P. 2d 17, 19–20 (1956); *People* v. *Miller*, 193 Cal. App. 2d 838, 14 Cal. Rptr. 704 (1961), and *People* v. *Campos*, 184 Cal. App. 2d 489, 7 Cal. Rptr. 513 (1960). See also *People* v. *Lopez*, 74 Cal. Rptr. 740, at 744 n. 2 (1969) (dictum).

[6] At the preliminary hearing and trial, the only disparities in description established were that Miller was two inches taller and 10 pounds heavier than Hill.

[7] In denying the motion to suppress, the trial judge took judicial notice of the fact "that those who are apprehended and are arrested many times attempt to avoid arrest by giving false identification."

Moreover, there was a lock on the door and Miller's explanation for his mode of entry was not convincing.[8] He also denied knowledge of firearms in the apartment although a pistol and loaded ammunition clip were in plain view in the room.[9] The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

Nor can we agree with petitioner that however valid the arrest of Miller, the subsequent search violated the

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[8] Petitioner points out that the officers had no idea how Miller gained access to the Hill apartment, and asserts that it was improper for them to assume that he was lawfully there. It is undisputed that Miller was the only occupant of the apartment. One of the officers testified that there was a lock on the door and that he had asked Miller how he had gotten into the apartment; Miller made no specific reply, except to reiterate that he had come in and was waiting for Hill, the tenant.

[9] Petitioner also claims that it was unreasonable for the officers to disregard Miller's proffered identification. However, Miller's answer to the question about firearms could reasonably be regarded as evasive, and his subsequent production of identification as therefore entitled to little weight. Petitioner stresses that Miller was subsequently booked in his own name when taken to the stationhouse, arguing that this demonstrates that the officers' belief that Miller was Hill was unreasonable. However, the trial judge found that the arresting officer was not responsible for the booking procedures which would book Miller under whatever name he gave at the stationhouse. This conclusion is buttressed by the fact that Miller was not released from custody for a day and a half, after a thorough check of his identification revealed that he had in fact told the truth about his identity, despite his evasiveness in dealing with the officers at the apartment.

Fourth Amendment. It is true that Miller was not Hill; nor did Miller have authority or control over the premises, although at the very least he was Hill's guest. But the question is not what evidence would have been admissible against Hill (or against Miller for that matter) if the police, with probable cause to arrest Miller, had arrested him in Hill's apartment and then carried out the search at issue. Here there was probable cause to arrest Hill and the police arrested Miller in Hill's apartment, reasonably believing him to be Hill. In these circumstances the police were entitled to do what the law would have allowed them to do if Miller had in fact been Hill, that is, to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed. When judged in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949), the arrest and subsequent search was reasonable and valid under the Fourth Amendment.

III

Finally, in his brief in this Court, petitioner argues that the admission in evidence of the two pages of his diary—pages which contained what amounted to a confession of the robbery—violated the Fifth Amendment under *Boyd* v. *United States*, 116 U. S. 616 (1886). Counsel for Hill conceded at oral argument that the Fifth Amendment issue was not raised at trial. Nor was the issue raised, briefed or argued in the California appellate courts.[10] The petition for certiorari likewise ignored it. In this posture of the case, the question, although briefed and argued here, is not properly before us. In *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969), certiorari was granted to consider the constitutionality of a Louisiana statute,

[10] Transcript of Oral Argument, pp. 34–35.

but at oral argument it developed that the federal question had never been raised, preserved, or passed upon in the state courts. Relying on a long line of cases, we dismissed the writ for want of jurisdiction. 394 U. S., at 439. In addition, we stated that there were sound policy reasons for adhering to such a rule. In the context of that case, we indicated the desirability of allowing state courts to pass first on the constitutionality of state statutes in light of a federal constitutional challenge; this assures both an adequate record and that the States have first opportunity to provide a definitive interpretation of their statutes. We also indicated that a federal habeas corpus remedy might remain if no state procedure for raising the issue was available following dismissal of the writ. These considerations are no less applicable in this case. We therefore do not reach the Fifth Amendment question and affirm the judgment of the Supreme Court of California.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE DOUGLAS took no part in the consideration or the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 51.—October Term, 1970

Archie William Hill, Jr., Petitioner, *v.* State of California.	On Writ of Certiorari to the Supreme Court of California.

[April 5, 1971]

Mr. Justice Harlan, whom Mr. Justice Marshall joins, concurring in part and dissenting in part.

I agree with the Court's opinion except for its conclusion that the *Chimel* case is not to be applied to this one.

Two Terms ago, in *Chimel* v. *California*, 395 U. S. 752 (1969), we held that a search without a warrant, but incident to a lawful arrest, must be narrowly confined in scope if it is to pass constitutional muster. In such circumstances, we said:

> "There is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> "There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less." 395 U. S., at 763 (footnote omitted).

The search here involved, fully described in the Court's opinion, plainly exceeded the bounds set forth in *Chimel*. The State contends that the search here was consistent with *Chimel* because conducted in the evening when it was not possible to obtain a search warrant. Whatever validity such a limiting principle might have in other contexts, it certainly cannot properly be invoked here. Baum and Bader had implicated Hill at least 24 hours prior to the search of Hill's apartment. Moreover, the State does not explain why it would not have been possible to observe the apartment after the mistaken arrest of Miller as Hill and then test before a magistrate the validity of their belief that they had probable cause for the issuance of a warrant authorizing a complete search of the apartment.

Because I believe this case reveals an obvious violation of *Chimel* and because I consider we are duty bound to apply the principles there enunciated to cases, like this one, before us on direct review, see my dissent in *Williams* v. *United States* (and companion cases), — U. S. —, — (1971), decided today, I am compelled to cast my vote for reversal of the judgment of the Supreme Court of California.